1954

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING

QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

AND DECISIONS IN

THE COURT OF CRIMINAL APPEAL

EDITOR -	R. P. COLINVAUX,	Barristers-at-Law
ASSISTANT EDITOR -	CHARLES CLAYTON,	

REPORTERS:

Court of Appeal, Queen's Bench, Court of Criminal Appeal; Appeals from County Courts.	A. W. GRANT, P. B. DURNFORD, E. DANGERFIELD, J. F. LAMB, B. A. BICKNELL, M. M. HILL, J. D. PENNINGTON.	*Barristers-at-Law*

1954—Vol. I.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 3 STONE BUILDINGS,
LINCOLN'S INN, LONDON, W.C.2,
AND
PRINTED BY THE EASTERN PRESS, LTD., LONDON AND READING

BIBL. LONDIN. UNIV.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES

MEMBERS OF THE COUNCIL

Chairman—The Hon. Mr. Justice McNAIR
Vice-Chairman—Sir LESLIE FARRER, K.C.V.O.

EX-OFFICIO MEMBERS

Sir LIONEL F. HEALD, Q.C., M.P.	ATTORNEY-GENERAL
Sir REGINALD MANNINGHAM-BULLER, Q.C., M.P.	SOLICITOR-GENERAL
FREDERIC H. JESSOP, Esq., LL.B.	President of the Law Society

ELECTED MEMBERS

The Right Hon. Lord Justice JENKINS J. H. STAMP, Esq.	Lincoln's Inn
J. V. NESBITT, Esq. R. E. BURRELL, Esq., Q.C.	Inner Temple
W. LATEY, Esq., M.B.E., Q.C. MONTAGUE L. BERRYMAN, Esq., Q.C.	Middle Temple
The Hon. Mr. Justice McNAIR S. E. POCOCK, Esq., O.B.E. *A. G. P. JOHNSON, Esq.	Gray's Inn
H. EDMUND DAVIES, Esq., Q.C. R. E. MEGARRY, Esq.	Appointed on the nomination of the General Council of the Bar
Sir LESLIE FARRER, K.C.V.O. (Firm: Messrs. Farrer & Co.) KENNETH D. COLE, Esq. (Firm: Messrs. Linklaters & Paines)	The Law Society

* Co-opted Member.

Secretary—F. G. HUDSON

Assistant Secretary—F. E. SMITH

3 Stone Buildings, Lincoln's Inn, W.C.2

JUDGES

OF

THE COURT OF APPEAL

1954

Lord Simonds, Lord Chancellor

Lord Goddard, Lord Chief Justice of England

Sir Francis Raymond Evershed, Master of the Rolls

Lord Merriman	President of the Probate, Divorce and Admiralty Division
Sir Donald Bradley Somervell	Lords Justices
Sir John Edward Singleton	
Sir Alfred Thompson Denning	
Sir David Llewelyn Jenkins	
Sir William Norman Birkett	
Sir Francis Lord Charlton Hodson	
Sir John William Morris	
Sir Charles Robert Ritchie Romer	

JUDGES

OF

THE QUEEN'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE

1954

Lord GODDARD, Lord Chief Justice of England, President
Sir MALCOLM HILBERY
Sir ROLAND GIFFARD OLIVER
Sir WINTRINGHAM NORTON STABLE
Sir JAMES DALE CASSELS
Sir HUGH IMBERT PERIAM HALLETT
Sir GONNE ST. CLAIR PILCHER
Sir GEORGE JUSTIN LYNSKEY
Sir AUSTIN ELLIS LLOYD JONES
Sir LAURENCE AUSTIN BYRNE
Sir FREDERIC AKED SELLERS
Sir DONALD LESLIE FINNEMORE
Sir GEOFFREY HUGH BENBOW STREATFEILD
Sir BENJAMIN ORMEROD
Sir GERALD OSBORNE SLADE
Sir EDWARD HOLROYD PEARCE
Sir PATRICK ARTHUR DEVLIN
Sir HUBERT LISTER PARKER
Sir WILLIAM GORMAN
Sir PATRICK REDMOND JOSEPH BARRY
Sir TERENCE NORBERT DONOVAN
Sir WILLIAM LENNOX MCNAIR
Sir CECIL ROBERT HAVERS
Sir COLIN HARGREAVES PEARSON
Sir HILDRETH GLYN-JONES
Sir ALBERT DENIS GERRARD

Attorney-General

Sir LIONEL FREDERICK HEALD

Solicitor-General

Sir REGINALD EDWARD MANNINGHAM-BULLER

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1954, will be as follows:—

In the First Series,
[1954] Ch.

In the Second Series,
[1954] 1 Q.B. [1954] 2 Q.B. [1954] P.

In the Third Series,
[1954] A.C.

TABLE OF CASES REPORTED

IN THIS VOLUME

PAGE

A

Algar, Regina *v.* - 279
Alker, Plunkett *v.* - 420
Atlantic Maritime Co. Inc. *v.* Gibbon - 88

B

Barclays Woollen Co. Ld., Brewer Street Investments Ld. *v.* - 428
Billing *v.* Pill - 70
Bowskill *v.* Dawson. National Provincial Bank Ld. *v.* Dawson - 288
Brewer Street Investments Ld. *v.* Barclays Woollen Co. Ld. - 428
Brighton and Area Rent Tribunal, Regina *v.* *Ex parte* Slaughter - 446
British "Rema" Manufacturing Co. Ld., Cullinane *v.* 292

C

Calvert *v.* Mayes - 342
Capel, Cave *v.* - 367
Cardiff Corporation, Smith *v.* 210
Cave *v.* Capel - 367
China *v.* Harrow Urban District Council - 178
Christopher Brown Ld. *v.* Genossenschaft Oesterreichischer - 8
Clarke, Mason *v.* - 460
Cole, Wormald *v.* - 614
Coulsdon and Purley Urban District Council, Hawkins *v.* - 319
Courtney, Nightingale *v.* - 399
Cullinane *v.* British "Rema" Manufacturing Co. Ld. - 292

D

Dale, Eales *v.* - 539
Dawson, Bowskill *v.* - 288
Dawson, National Provincial Bank Ld. *v.* - 288
Deeble *v.* Robinson - 77
Dowker, Wurzal *v.* - 52
Downes, *Ex parte.* Regina *v.* County of London Quarter Sessions - 1
Drive Yourself Hire Co. (London) Ld. *v.* Strutt - 250

E

Eales *v.* Dale - 539
Eban (J.) Ld., Goodman *v.* - 550
Evening Standard Co. Ld., Regina *v.* - 578

F

Fewtrell, Hawksl~~ey~~ *v.* - 228
Folkestone Rent Tribunal, Regina *v.* *Ex parte* Webb 454n.
Foster, Harvell *v.* - 591

G

Genossenschaft Oesterreichischer, Christopher Brown Ld. *v.* - 8

PAGE

Gertzenstein (R.) Ld., Solomons *v.* 565
Gibbon, Atlantic Maritime Co. Inc. *v.* 88
Gluchowska *v.* Tottenham Borough Council 439
Goodman *v.* J. Eban Ld. 550
Gough *v.* National Coal Board 191
Grainger *v.* Liverpool Corporation 351

H
Harper, Phillips-Higgins *v.* 411
Harrow Urban District Council, China *v.* 178
Hartley *v.* Mayoh & Co. 383
Harvell *v.* Foster 591
Hawkins *v.* Coulsdon and Purley Urban District Council 319
Hawksley *v.* Fewtrell 228
Henry *v.* Taylor 506
Houghton *v.* Trafalgar Insurance Co. Ld. 247
Howard, Vinall *v.* 375

I
Ingle, *Ex parte.* Regina *v.* York, Harrogate, Ripon and Northallerton Areas Rent Tribunal 456

J
Johnson, Stockloser *v.* 476
Jura, Regina *v.* 503

K
Keen, Warren *v.* 15
Knight *v.* Olive 514

L
Lambert *v.* Ve-Ri-Best Manufacturing Co. Ld. 524
Lewis, Temple *v.* 22
Liverpool Corporation, Grainger *v.* 351
London, Corporation of, *Ex parte.* Regina *v.* Minister of Housing and Local Government 140
London County Quarter Sessions, Regina *v.* *Ex parte* Downes 1

PAGE

M
Mackinnon, Third Party. Marles *v.* Philip Trant & Sons Ld. 29
Marles *v.* Philip Trant & Sons Ld. Mackinnon, Third Party 29
Mason *v.* Clarke 460
Mayes, Calvert *v.* 342
Mayoh & Co., Hartley *v.* 383
Minister of Housing and Local Government, Regina *v.* *Ex parte* Corporation of London 140

N
National Coal Board, Gough *v.* 191
National Provincial Bank Ld. *v.* Dawson 288
Newborne *v.* Sensolid (Great Britain) Ld. 45
Newland, Regina *v.* 158
Nightingale *v.* Courtney 399

O
Olive, Knight *v.* 514

P
Page, Regina *v.* 170
Park Estates (Southgate) Ld., Southgate Borough Council *v.* 359
Philip Trant & Sons Ld., Marles *v.* Mackinnon, Third Party 29
Phillips-Higgins *v.* Harper 411
Pill, Billing *v.* 70
Plunkett *v.* Alker 420

R
Regina *v.* Algar 279
Regina *v.* Brighton and Area Rent Tribunal. *Ex parte* Slaughter 446
Regina *v.* County of London Quarter Sessions. *Ex parte* Downes 1
Regina *v.* Evening Standard Co. Ld. 578
Regina *v.* Folkestone Rent Tribunal. *Ex parte* Webb 454n.
Regina *v.* Jura 503
Regina *v.* Minister of Housing and Local Government. *Ex parte* Corporation of London 140

PAGE

Regina *v.* Newland - - 158
Regina *v.* Page - - - 170
Regina *v.* York, Harrogate, Ripon and Northallerton Areas Rent Tribunal. *Ex parte* Ingle - - - 456
Rickett Cockerell & Co. Ld., Wilson *v.* - - - - 598
Robinson, Deeble *v.* - - 77

S

Sensolid (Great Britain) Ld., Newborne *v.* - - - 45
Slaughter, *Ex parte.* Regina *v.* Brighton and Area Rent Tribunal - - - - 446
Smith *v.* Cardiff Corporation 210
Solomons *v.* R. Gertzenstein Ld. - - - - - - 565
Southgate Borough Council *v.* Park Estates (Southgate) Ld. - - - - - 359
Spiers *v.* Warrington Corporation - - - - - - 61
Stockloser *v.* Johnson - - 476
Strutt, Drive Yourself Hire Co. (London) Ld. *v.* - - 250

PAGE

T

Taylor, Henry *v.* - - - 506
Temple *v.* Lewis - - - 22
Tottenham Borough Council, Gluchowska *v.* - - - 439
Trafalgar Insurance Co. Ld., Houghton *v.* - - - 247

V

Ve-Ri-Best Manufacturing Co. Ld., Lambert *v.* - - 524
Vinall *v.* Howard - - - 375

W

Warren *v.* Keen - - - 15
Wurzal *v.* Dowker - - 52
Warrington Corporation, Spiers *v.* - - - - - - 61
Webb, *Ex parte.* Regina *v.* Folkestone Rent Tribunal 454n.
Wilson *v.* Rickett Cockerell & Co. Ld. - - - - 598
Wormald *v.* Cole - - - 614

Y

York, Harrogate, Ripon and Northallerton Areas Rent Tribunal, Regina *v.* *Ex parte* Ingle - - - 456

TABLE OF CASES CITED AND JUDICIALLY NOTICED

ABBREVIATIONS

Aff. affirmed	*D.* disapproved	*N.F.* not followed	*R.* referred to in judgment
Appl. applied	*Dist.* distinguished	*O.* overruled	*Rev.* reversed
Appr. approved	*E.* explained	*Q.* questioned	
C. considered	*F.* followed		

			Page
Acebal *v.* Levy	10 Bing. 376		541
Adams *v.* Adams	[1941] 1 K.B. 536	*R.*	287
Alexander *v.* Rayson	[1936] 1 K.B. 169	*R.*	470
Anderson-Berry, *In re*	[1928] Ch. 290		594
Anderson Ld. *v.* Daniel	[1924] 1 K.B. 138	*Dist.*	30, 32, 33, 36, 37, 41, 43, 44
Anderson *v.* Buckton	1 Str. 192	*R.*	621, 634
Andrew Millar & Co. Ld. *v.* Taylor & Co. Ld.	[1916] 1 K.B. 402	*C.*	89, 114, 115, 132, 133
Anglo-Northern Trading Co. Ld. *v.* Emlyn Jones and Williams	[1917] 2 K.B. 78		109
Archbishop of Canterbury *v.* Robertson	1 Cr. & M. 690	*R.*	597
Arcos Ld. *v.* Ronaasen & Son	[1933] A.C. 470		605
Ashbury Railway Carriage and Iron Co. *v.* Riche	L.R. 7 H.L. 653		355
Askey *v.* Golden Wine Co. Ld.	64 T.L.R. 379	*R.*	39
Associated Oil Carriers Ld. *v.* Union Insurance Society of Canton Ld.	[1917] 2 K.B. 184		95
Atkinson *v.* Ritchie	10 East 530	*R.*	113
Atlantic Maritime Co. Inc. *v.* Gibbon	[1953] 2 W.L.R. 725	*Aff.*	89
Attenborough *v.* Solomon	[1913] A.C. 76	*R.*	597
Attorney-General for Hong Kong *v.* Kwok-a-Sing	L.R. 5 P.C. 179		171
Attorney-General *v.* Ard Coasters Ld., etc.	[1921] 2 A.C. 141		95
Attorney-General *v.* Aspinall	2 My. & Cr. 613		355
Attorney-General *v.* Great Eastern Railway Co.	11 Ch.D. 449; 5 App.Cas. 473	*Dict. Appr. & Appl.*	352, 358
Attorney-General *v.* Manchester Corporation	[1906] 1 Ch. 643		355
Attorney-General *v.* Newcastle Corporation	23 Q.B.D. 492		355
Attorney-General *v.* Smethwick Corporation	[1932] 1 Ch. 562	*R.*	358
Auworth *v.* Johnson	5 C. & P. 239	*R.*	18
Badham *v.* Lambs Ld.	[1946] K.B. 45		572
B. & B. Viennese Fashions *v.* Losane	[1952] 1 T.L.R. 750	*Dist.*	30, 33, 36
Baker *v.* Bethnal Green Borough Council	[1945] 1 All E.R. 135	*R.*	335
Baker *v.* Courage & Co.	[1910] 1 K.B. 56	*R.*	417, 418
Baker *v.* Oakes	2 Q.B.D. 171	*R.*	246
Baldry *v.* Marshall	[1925] 1 K.B. 260	*R.*	612
Banbury *v.* Bank of Montreal	[1917] 1 K.B. 409	*F.*	228, 236, 237, 242
Bank Line Ld. *v.* Arthur Capel & Co. Ld.	[1919] A.C. 435	*C.*	89, 96, 113, 130, 133, 137
Barnard *v.* Gorman	[1941] A.C. 378	*R.*	444
Barrell *v.* Fordree	[1932] A.C. 676		508
Barton *v.* Capewell Continental Patents Co. Ld.	68 L.T. 857	*R.*	488
Beaman *v.* A.R.T.S. Ld.	[1949] 1 K.B. 550		415
Becker, Gray & Co. *v.* London Assurance Corporation	[1918] A.C. 101	*R.*	97
Bedford (Duke of) *v.* Ellis	[1899] 1 Ch. 494; [1901] A.C. 1	*Dist.*	211, 219, 220, 225
Belcher *v.* Reading Corporation	[1950] Ch. 380	*R.*	217

Bell, *Ex p.*	1 M. & S. 751	*R.*	33
Bennett *v.* Brumfitt	L.R. 3 C.P. 28	*Appl.*	551, 555, 556
Bensaude *v.* Thames and Mersey Marine Insurance Co. Ld.	[1897] A.C. 609	*C.*	89, 122–6, 128, 139
Bentley *v.* Fleming	3 Dow. & L. 23	*R.*	238, 244
Beresford *v.* Royal Insurance Co. Ld.	[1937] 2 K.B. 197; [1938] A.C. 586	*R.*	37, 39
Berg *v.* Sadler and Moore	[1937] 2 K.B. 158	*R.*	38
Biddle *v.* Truvox Engineering Co. Ld.	[1952] 1 K.B. 101		572
Biggin & Co. Ld. *v.* Permanite Ld.	[1951] 1 K.B. 422	*R.*	34
Bird *v.* Holbrook	4 Bing. 628	*R.*	198
Birmingham and Midland Motor Omnibus Co. Ld. *v.* Nelson	[1933] 1 K.B. 188		55
Blakemore *v.* Bristol and Exeter Railway Co.	8 E. & B. 1035	*R.*	332, 333
Bolch *v.* Smith	7 H. & N. 736		321
Bolton *v.* Stone	[1951] A.C. 850		323
Borthwick-Norton *v.* Collier	[1950] 2 K.B. 594	*R.*	150, 151
Bostel Bros. Ld. *v.* Hurlock	[1949] 1 K.B. 74		430
Bowmakers Ld. *v.* Barnet Instruments Ld.	[1945] K.B. 65		466
Boyer *v.* Warbey	[1953] 1 Q.B. 234	*R.*	270
Boyer *v.* Warbey	[1953] 1 Q.B. 234	*R.*	466
Bradley *v.* Wallaces Ld.	[1913] 3 K.B. 629	*R.*	623, 629
Bristol Tramways, etc., Carriage Co. Ld. *v.* Fiat Motors Ld.	[1910] 2 K.B. 831	*R.*	613
Bristow *v.* Cormican	3 App.Cas. 641		463
Britannic Merthyr Coal Co. Ld. *v.* David	[1910] A.C. 74		572
British Actors' Film Co. *v.* Glover	[1918] 1 K.B. 299		466
British and Foreign Marine Insurance Co. Ld. *v.* Samuel Sanday & Co.	[1916] 1 A.C. 650	*R.*	97
British Movietonews Ld. *v.* London and District Cinemas Ld.	[1952] A.C. 166		95
Brooksbank *v.* Smith	2 Y. & C.Ex. 58	*R.*	417
Broome *v.* Pardess Co-operative Society of Orange Growers (Est. 1900) Ld.	56 T.L.R. 430		431
Bryce, In the Goods of	2 Curt. 325		553
Buckle *v.* Holmes	[1926] 2 K.B. 125	*F.*	614, 624, 629, 631
Bulli Gold Mining Co. *v.* Osborne	[1899] A.C. 351		416
Burns *v.* Radcliffe	[1923] 2 I.R. 158	*R.*	453
Burrows *v.* Rhodes	[1899] 1 Q.B. 816	*R.*	39
Butler (or Black) *v.* Fife Coal Co. Ld.	[1912] A.C. 149		572
Cammell Laird & Co. *v.* Manganese Bronze and Brass Co. Ld.	[1934] A.C. 402		602
Carnegie *v.* Waugh	2 Dowl. & Ry. 277	*R.*	272, 273
Carras *v.* London and Scottish Assurance Corporation Ld.	[1936] 1 K.B. 291; 52 Ll.L.Rep. 34	*R.*	101, 102, 121, 126, 128
Cave *v.* Capel	[1953] 1 W.L.R. 1185	*Rev.*	367
Chaproniere *v.* Mason	21 T.L.R. 633	*R.*	606, 609
Chelsea and Walham Green Building Society *v.* Armstrong	[1951] Ch. 853	*R.*	273, 274
Chesterfield and Midland Silkstone Colliery Co. Ld. *v.* Hawkins	3 H. & C. 677	*R.*	273
Clarke *v.* Brims	[1947] K.B. 497		572
Cleobury Mortimer R.D.C. *v.* Childe	[1933] 2 K.B. 368		466
Coates *v.* Rawtenstall Corporation	157 L.T. 415	*R.*	329
Cointat *v.* Myham & Son	[1913] 2 K.B. 220	*R.*	39
Coleshill *v.* Manchester Corporation	[1928] 1 K.B. 776	*R.*	339
Collingwood *v.* Home and Colonial Stores Ld.	53 T.L.R. 53	*F.*	566, 574
Colman *v.* Eastern Counties Railway Co.	10 Beav. 1	*R.*	221

Commissioner of Public Works *v.* Hills	[1906] A.C. 368	*C.*	477, 488, 498
Connolly to Sheridan, *Ex p.*, and Russell, *In re*	[1900] 1 I.R. 1		145
Cooden Engineering Co. Ld. *v.* Stanford	[1953] 1 Q.B. 86	*C.*	477, 489
Cook *v.* Montagu	L.R. 7 Q.B. 418		147
Cooke *v.* Midland Great Western Railway of Ireland	[1909] A.C. 229	*R.*	203, 207–9
Cooke *v.* Midland Great Western Railway of Ireland	[1909] A.C. 229	*C.*	319, 327, 334, 339
Cooker *v.* Child	2 Lev. 74	*R.*	273, 274
Cooper *v.* Phibbs	L.R. 2 H.L. 149		416
Corby *v.* Hill	4 C.B.N.S. 556	*C.*	319, 328, 331–3, 339
Cory *v.* Burr	8 App.Cas. 393	*C.*	88, 119, 120, 134
Cory *v.* Thames Ironworks, etc., Co.	L.R. 3 Q.B. 181	*R.*	38
Cory *v.* Thames Ironworks and Shipbuilding Co.	L.R. 3 Q.B. 181		296
Court *v.* Robinson	[1951] 2 K.B. 60		449
Cow *v.* Casey	[1949] 1 K.B. 474	*Appl.*	515, 520, 521, 523
Cox *v.* Burbidge	13 C.B.N.S. 430	*R.*	621, 622, 627–9, 632, 634
Crage *v.* Fry	67 J.P. 240	*R.*	39
Crane *v.* Director of Public Prosecutions	[1921] 2 A.C. 299	*R.*	169
Cutler *v.* Wandsworth Stadium Ld.	[1949] A.C. 398		571
Dagenham (Thames) Dock Co., *In re*; *Ex p.* Hulse	L.R. 8 Ch. 1022	*C.*	477, 485, 486, 496–8
Dalrymple's Trustees *v.* Brown	1945 S.C. 190		265
Danby *v.* Watson	46 L.J.M.C. 179; 41 J.P. 406		180
Davidson *v.* Willasey	1 M. & S. 313		96
Davies *v.* Swan Motor Co. (Swansea) Ld.	[1949] 2 K.B. 291		196
Davies *v.* Swan Motor Co. (Swansea) Ld.	[1949] 2 K.B. 291		387
Davis *v.* Burrell and Lane	10 C.B. 821	*R.*	183, 187
Dawson & Co. *v.* Bingley U. D. C.	[1911] 2 K.B. 149		572
De Coppett *v.* Barnett	17 T.L.R. 273	*R.*	372
Deen *v.* Davies	[1935] 2 K.B. 282	*R.*	633
Degg *v.* Midland Railway Co.	1 H. & N. 773	*R.*	330
Dennis *v.* Hutchinson	[1922] 1 K.B. 693	*R.*	79, 85
Dennis (J.) & Co. Ld. *v.* Munn	[1949] 2 K.B. 327	*R.*	38
Dennis (J.) & Co. Ld. *v.* Munn	[1949] 2 K.B. 327	*Dist.*	428, 434, 435
Denys *v.* Shuckburgh	4 Y. & C.Ex. 42	*R.*	417
De Reneville *v.* De Reneville	[1948] P. 100	*R.*	287
Dewhirst, *In re*, Flower *v.* Dewhirst	[1948] Ch. 198		283
Dies *v.* British and International Mining and Finance Corporation Ld.	[1939] 1 K.B. 724	*C.*	477, 483, 488, 490
Diplock, *In re*	[1948] Ch. 465	*R.*	417
Dobbs *v.* Brain	[1892] 2 Q.B. 207	*Dist.*	592, 596
Dodworth *v.* Dale	[1936] 2 K.B. 503		283
Doe *d.* Douglas *v.* Lock	2 Ad. & E. 705		466
Doe *d.* Gray *v.* Stanion	1 M. & W. 695	*Appl.*	399, 405
Doe *d.* Lewis *v.* Baster	6 N. & M. 541	*R.*	237, 238, 244
Doe *v.* Bridges	1 B. & Ad. 847	*R.*	577
Doker *v.* Hasler	Ry. & M. 198	*R.*	286
Doncaster Amalgamated Collieries Ld. *v.* Leech	[1941] 1 K.B. 649		345
Donoghue *v.* Stevenson	[1932] A.C. 562	*R.*	331, 333
Donovan *v.* Union Cartage Co. Ld.	[1933] 2 K.B. 71		196
Drive Yourself Hire Co. (London) Ld. *v.* Strutt	[1953] 2 W.L.R. 953	*Rev.*	251
Duke *v.* Jackson	1921 S.C. 362	*D.*	598, 606, 610
Dunlop Pneumatic Tyre Co. Ld. *v.* Selfridge & Co. Ld.	[1915] A.C. 847	*R.*	274

Dunlop Pneumatic Tyre Co. Ld. *v.* New Garage and Motor Co. Ld.	[1915] A.C. 79	*C.*	477, 483, 484, 498
Dunster *v.* Abbott	[1954] 1 W.L.R. 58	*R.*	331
Dutton *v.* Poole	2 Lev. 210	*R.*	272, 274
Dyson *v.* Foster	[1909] A.C. 98		265
East Dean Overseers *v.* Everett	3 E. & E. 574		180
Eaton *v.* Daines	[1894] W.N. 32	*R.*	596
Eaves, *In re*	[1940] Ch. 109	*R.*	287
Edwards *v.* Railway Executive	[1952] A.C. 737		195
Elliot *v.* Boynton	[1924] 1 Ch. 236	*R.*	37
Ellis *v.* Deheer	[1922] 2 K.B. 113	*R.*	239, 246
Ellis *v.* Fulham Borough Council	[1938] 1 K.B. 212	*R.*	329, 336
Ellis *v.* Loftus Iron Co.	L.R. 10 C.P. 10	*Appl.*	614, 620, 622–5, 629, 635
Elwes *v.* Maw	2 Sm.L.C., 13th ed., 193	*R.*	75
Epsom Grand Stand Association Ld. *v.* Clarke	35 T.L.R. 525	*R.*	451, 459
Everth *v.* Smith	2 M. & S. 278		96
Fairman *v.* Perpetual Investment Building Society	[1923] A.C. 74	*C.*	319, 334, 335, 337–40
Falkingham *v.* Victorian Railways Commissioner	[1900] A.C. 452	*R.*	14
Fanshaw *v.* Knowles	[1916] 2 K.B. 538	*Dist. & Dicta F.*	228, 233–7, 241, 242, 245
Farrant *v.* Barnes	11 C.B.N.S. 553		325
Ferguson *v.* Anon.	2 Esp. 590	*R.*	21
Filliter *v.* Phippard	11 Q.B. 347		569
Fitzgerald *v.* Firbank	[1897] 2 Ch. 96		463
Fitzpatrick *v.* Barr	1948 S.L.T.(Sh. Ct.) 5		604
Forestal Land, Timber and Railways Co. Ld. *v.* Rickards	[1941] 1 K.B. 225; [1942] A.C. 50	*R.*	111
Forester's Case, The	Y.B. 11 & 12 Edw. III, 641, Rolls Series (31s)		73
Foster *v.* Robinson	[1951] 1 K.B. 149		402
Fox *v.* Burgess	[1922] 1 K.B. 623	*R.*	65
Fletcher *v.* Rylands	L.R. 1 Ex. 265		619
Frawley (M. & F.) Ld. *v.* The Ve-Ri-Best Co. Ld.	[1953] 1 Q.B. 318	*R.*	79, 83, 85, 87
French *v.* Hills Plymouth Co.	24 T.L.R. 644		197
Frost *v.* Aylesbury Dairy Co. Ld.	[1905] 1 K.B. 608	*R.*	606
Gardiner *v.* Colyer	10 L.T. 715		466
Gautret *v.* Egerton	L.R. 2 C.P. 371	*C.*	319, 327, 330, 332, 334, 338
Geddling *v.* Marsh	[1920] 1 K.B. 668		600
Geipel *v.* Smith	L.R. 7 Q.B. 404	*R.*	113, 132
Gibbs, decd., *In re*	[1951] Ch. 933	*R.*	596
Gilbey *v.* Copley	3 Lev. 138, 140	*R.*	273
Gillespie Bros. & Co. *v.* Cheney, Eggar & Co.	[1896] 2 Q.B. 59		601
Gill *v.* Mellor	[1924] 1 K.B. 97		180
Glasgow Corporation *v.* Muir	[1943] A.C. 448		389
Glasgow Corporation *v.* Taylor	[1922] 1 A.C. 44	*R.*	200
Glasgow Corporation *v.* Taylor	[1922] 1 A.C. 44		323
Glossop *v.* Ashley	[1922] 1 K.B. 1		265
Gluchowska *v.* Tottenham Borough Council	[1954] 2 W.L.R. 302		508
Gordon *v.* Chief Commissioner of Metropolitan Police	[1910] 2 K.B. 1080	*R.*	38
Gorris *v.* Scott	L.R. 9 Ex. 125		572
Gosling *v.* Woolf	[1893] 1 Q.B. 39	*R.*	278
Gough *v.* National Coal Board	[1953] 3 W.L.R. 900	*R.*	337
Grant *v.* Australian Knitting Mills Ld.	[1936] A.C. 85, 100	*Appl.*	598, 608

Grayson *v.* Atkinson	2 Ves.Sen. 454	*R.*	562
Great Eastern Railway Co. *v.* Hackney District Board of Works	8 App.Cas. 687		145
Groves *v.* Lord Wimborne	[1898] 2 Q.B. 402	*R.*	390
Groves *v.* Wimborne (Lord)	[1898] 2 Q.B. 402	*Appl.*	567, 577
Gunter *v.* Davis	[1925] 1 K.B. 124	*R.*	259
Hadley *v.* Baxendale	9 Exch. 341	*Appl.*	292, 300, 301
Hance *v.* Burnett	45 J.P. 54	*R.*	425, 426
Harding *v.* Price	[1948] 1 K.B. 695		378
Hardy *v.* Central London Railway Co.	[1920] 3 K.B. 459	*Dist.*	192, 200, 203, 207, 208
Harper & Co. *v.* Vigers Bros.	[1909] 2 K.B. 549	*C.*	46, 51
Harper *v.* Carr	7 Term R. 270	*R.*	189
Hartley *v.* Mayoh & Co.	[1953] 2 All E.R. 525	*Varied*	384
Haseldine *v.* Hosken	[1933] 1 K.B. 822	*R.*	39, 44
Hawkins *v.* Coulsdon and Purley U.D.C.	[1953] 1 W.L.R. 882	*Aff.*	319
Hayward *v.* Drury Lane Theatre Ld. and Moss' Empires Ld.	[1917] 2 K.B. 899	*R.*	336, 339
Haywood *v.* Silber	30 Ch.D. 404	*R.*	271
Heath's Garage *v.* Hodges	[1916] 2 K.B. 370		619
Heaven *v.* Pender	11 Q.B.D. 503	*C.*	319, 328, 331, 334, 339
Hewett *v.* Hattersley	[1912] 3 K.B. 28, 35	*R.*	444
Hicks *v.* Snook	93 J.P. 55	*R.*	451, 453
Holdman *v.* Hamlyn	[1943] K.B. 664	*Appl.*	192, 200
Holland *v.* Hodgson	L.R. 7 C.P. 328	*C.*	71, 75
Hollman *v.* Pullin	Cab. & E. 254	*R.*	49
Horsefall *v.* Mather	Holt N.P. 7	*R.*	20
Howell *v.* Falmouth Boat Construction Co. Ld.	[1951] A.C. 837	*R.*	37
Howe *v.* Smith	27 Ch.D. 89	*R.*	500
Huddersfield Police Authority *v.* Watson	[1947] K.B. 842		55
Hylton (Lord) *v.* Neal	[1921] 2 K.B. 438		265
Imperial Smelting Corporation Ld. *v.* Joseph Constantine Steamship Line Ld.	[1940] 1 K.B. 812; [1942] A.C. 154	*R.*	137
Indermaur *v.* Dames	L.R. 1 C.P. 274	*R.*	330, 338
Inland Revenue Commissioners *v.* Duke of Westminster	[1936] A.C. 1	*R.*	167
Jackson, Stansfield & Sons *v.* Butterworth	64 T.L.R. 481		430
Jackson *v.* Union Marine Insurance Co.	L.R. 10 C.P. 125		105
James *v.* British and General Insurance Co. Ld.	[1927] 2 K.B. 311	*C.*	30, 40, 44
Jeffryes *v.* Evans	19 C.B.N.S. 246		466
Jenkins *v.* Gaisford and Thring	3 Sw. & T. 93	*Appl.*	551, 556
Jenkins *v.* Great Western Railway Co.	[1912] 1 K.B. 525		194
Jenkins *v.* Howells	[1949] 2 K.B. 218	*R.*	68
Jennings & Chapman Ld. *v.* Woodman, Matthews & Co.	[1952] 2 T.L.R. 409	*R.*	436, 437
Jones, *Ex p.*	13 Ves. 237		581
Jones *v.* Cory Brothers & Co. Ld.	56 L.J. 302		213
Jones *v.* Jones	[1916] 2 A.C. 481	*R.*	286
Joseph Constantine Steamship Line Ld. *v.* Imperial Smelting Corporation Ld.	[1942] A.C. 154	*R.*	137
Keeble *v.* Miller	[1950] 1 K.B. 601	*R.*	381
Keeves *v.* Dean	[1924] 1 K.B. 685		265
Kelly *v.* Solari	9 M. & W. 54		416
Kelner *v.* Baxter	L.R. 2 C.P. 174	*C.*	46, 50
Kemble *v.* Farren	6 Bing. 141	*C.*	477, 483, 486

Kilmer *v.* British Columbia Orchard Lands Ld.	[1913] A.C. 319	*C.*	477, 497, 498
Kimber *v.* Gas Light and Coke Co.	[1918] 1 K.B. 439	*R.*	334
Kitchen's Trustee *v.* Madders	[1950] Ch. 134		448
Knapp *v.* Railway Executive	[1949] 2 All E.R. 508		572
Knight of St. Michael, The	[1898] P. 30		95
Kruse *v.* Johnson	[1898] 2 Q.B. 91		64
Kulukundis *v.* Norwich Union Fire Insurance Society	[1937] 1 K.B. 1		95
Laidlaw *v.* Wilson	[1894] 1 Q.B. 74		508
Langton *v.* Hughes	1 M. & S. 593	*R.*	33
Latham *v.* R. Johnson & Nephew Ld.	[1913] 1 K.B. 398	*R.*	198, 199
Latham *v.* R. Johnson & Nephew Ld.	[1913] 1 K.B. 398	*Dictum E.*	319, 337, 340
Leach *v.* Thomas	7 C. & P. 327		17
Lee *v.* K. Carter Ld.	[1949] 1 K.B. 85		270
Lee *v.* Riley	18 C.B.N.S. 722	*Appl.*	614, 621–5, 628, 629, 635
Leek and Moorlands Building Society *v.* Clark	[1952] 2 Q.B. 788	*Appl.*	399, 406, 409
Lewis *v.* Jones	2 M. & W. 203		368
Leyland Shipping Co. Ld. *v.* Norwich Union Fire Insurance Society	[1918] A.C. 350		95
Liddle *v.* Yorkshire (North Riding) County Council	[1934] 2 K.B. 101	*R.*	200
Liverpool and London War Risks Association Ld. *v.* Ocean Steamship Co. Ld.	[1948] A.C. 243		95
Liverpool Corporation *v.* Hope	[1938] 1 K.B. 751	*C.*	178, 183, 187, 188
Lloyd *v.* Heathcote	5 Moore C.P. 129	*R.*	183
London, Chatham and Dover Railway Co. *v.* Cable	80 L.T. 119		368
London County Council *v.* Aylesbury Dairy Co.	[1898] 1 Q.B. 106	*R.*	443
London County Council *v.* Maher	[1929] 2 K.B. 97	*Dist.*	61, 66, 67, 69
London County Council *v.* Stansell	154 L.T. 241	*Q.*	420, 425–7
London County Council *v.* Wandsworth Borough Council	[1903] 1 K.B. 797		145
London Graving Dock Co. Ld. *v.* Horton	[1951] A.C. 737	*R.*	337
London (Mayor, etc., of) *v.* Cox	L.R. 2 H.L. 239	*R.*	14
London Passenger Transport Board *v.* Upson	[1949] A.C. 155		572
Lord Strathcona S.S. Co. *v.* Dominion Coal Co.	[1926] A.C. 108		265
Loudon *v.* Ryder	[1953] 2 Q.B. 202		465
Lowe *v.* Adams	[1901] 2 Ch. 598	*R.*	466
Lowery *v.* Walker	[1910] 1 K.B. 173	*R.*	329
Lusk *v.* Barclay	1953 S.L.T. (Sh. Ct.) 23		604
Luxor (Eastbourne) Ld. *v.* Cooper	[1941] A.C. 108	*R.*	437
Lynch *v.* Nurdin	1 Q.B. 29	*R.*	198, 209
MacCarthy *v.* Young	6 H. & N. 329	*R.*	332, 333
Mackie *v.* Fox	75 J.P. 470	*R.*	183
Mackley *v.* Nutting	[1949] 2 K.B. 55		265
Mackusick *v.* Carmichael	[1917] 2 K.B. 581	*R.*	255
Macmillan *v.* Western S.M.T. Co.	1933 S.C. (J.) 51		56
Mactaggart *v.* Watson	3 Cl. & F. 525		595
Maley *v.* Fearn	62 T.L.R. 693	*R.*	266
Manchester Liners Ld. *v.* Reay Ld.	[1922] 2 A.C. 74		605
Mansfield Corporation *v.* Butterworth	[1898] 2 Q.B. 274	*Appl.*	360, 363, 365, 366
Manton *v.* Brocklebank	[1923] 2 K.B. 212	*R.*	623, 624, 626, 629, 635
Marchington *v.* Vernon	1 Bos. & P. 101n.	*R.*	272
Marsden *v.* Edward Heyes Ld.	[1927] 2 K.B. 1	*R.*	20, 21
Martyn *v.* Hind	2 Cowp. 437	*R.*	272

Mason *v.* Keeling	1 Ld.Raym. 606	*R.*	624, 625, 633
Mauray *v.* Durley Chine (Investments) Ld.	[1953] 2 Q.B. 433		508
Maynard *v.* Moseley	3 Swanst. 651	*C.*	477, 495
Mayson *v.* Clouet	[1924] A.C. 980	*R.*	490, 498, 499
McGreavy, *In re*	[1950] Ch. 150	*R.*	183
McLean *v.* Weaver	41 T.L.R. 47	*R.*	560
Medway Oil and Storage Co. Ld. *v.* Silica Gel Corporation	33 Com.Cas. 195		605
Mercantile S.S. Co. *v.* Tyser	7 Q.B.D. 73	*R.*	128
Merest *v.* Harvey	5 Taunt. 442		465
Mersey Docks and Harbour Board *v.* Procter	[1923] A.C. 253	*C.*	319, 329, 337, 339
Miller *v.* Law Accident Insurance Co.	[1903] 1 K.B. 712		95
Miller *v.* Pill	[1933] 2 K.B. 308	*Appl.*	53, 57, 58, 59, 60, 61
Mint *v.* Good	[1951] 1 K.B. 517		16
Mogul Steamship Co. Ld. *v.* McGregor, Gow & Co.	23 Q.B.D. 598	*R.*	166
Monk *v.* Warbey	[1935] 1 K.B. 75		572
Monk *v.* Warbey	[1935] 1 K.B. 75		388
Monroe *v.* Twistleton	Peake Add.Cas. 219	*R.*	286
Moore *v.* Hawkins	43 W.R. 235	*R.*	369
Morelli *v.* Fitch and Gibbons	[1928] 2 K.B. 636		602
Morrison Steamship Co. Ld. *v.* Greystoke Castle (Cargo Owners)	[1947] A.C. 265	*R.*	217
Muir *v.* James	[1953] 1 Q.B. 454	*R.*	434
Musgrove *v.* Pandelis	[1919] 2 Q.B. 43		569
Mussen *v.* Van Diemen's Land Co.	[1938] Ch. 253	*E.*	477, 487, 489, 491, 492, 494, 496, 500–2
Nelson *v.* Blackford	[1936] 2 All E.R. 109		55
Newborne *v.* Sensolid (Great Britain) Ld.	[1952] 2 T.L.R. 763	*Aff.*	46
Newbould *v.* Attorney-General	[1931] P. 75		283
Newell *v.* Cross and Others	[1936] 2 K.B. 632		56
New Zealand Shipping Co. Ld. *v.* Société des Ateliers et Chantiers de France	[1919] A.C. 1		431
Niblett Ld. *v.* Confectioners' Materials Co. Ld.	[1921] 3 K.B. 387, 404	*Appl.*	598, 608, 612, 613
Nicholls *v.* Ely Beet Sugar Factory	[1931] 2 Ch. 84		463
Nobel's Explosives Co. *v.* Jenkins & Co.	[1896] 2 Q.B. 326	*R.*	97, 113
Norman *v.* Simpson	[1946] K.B. 158	*R.*	266
Oak Property Co. Ld. *v.* Chapman	[1947] K.B. 886		265
O'Connor *v.* Marjoribanks	4 Man. & G. 435	*R.*	286
Oropesa, The	[1943] P. 32		619
Palmer *v.* Temple	9 Ad. & E. 508	*R.*	489, 493
Papadimitriou *v.* Henderson	55 T.L.R. 1035		95
Paris *v.* Stepney Borough Council	[1951] A.C. 367	*R.*	337
Pasmore *v.* Oswaldtwistle U. D. C.	[1898] A.C. 387	*Dist.*	567, 576, 577
Peach *v.* Lowe	[1947] 1 All E.R. 441		17
Pearson *v.* Lambeth Borough Council	[1950] 2 K.B. 353	*R.*	329, 334, 335
Peech *v.* Best	[1931] 1 K.B. 1	*C.*	460, 467, 471
Pesquerias y Secaderos de Bacalao de Espana S.A. *v.* Beer	[1949] W.N. 189		95
Petros M. Nomikos Ld. *v.* Robertson	[1938] 2 K.B. 603; [1939] A.C. 371	*R.*	126, 127
Phillips *v.* Britannia Hygienic Laundry Co. Ld.	[1923] 2 K.B. 832		572
Polemis and Furness, Withy & Co., *In re*	[1921] 3 K.B. 560	*R.*	635
Ponder, *In re*	[1921] 2 Ch. 59	*Appl.*	592, 596
Potter *v.* Rankin	L.R. 5 C.P. 341	*R.*	102
Potts *v.* Hickman	[1941] A.C. 212	*C.*	178, 184, 187, 190
Preist *v.* Last	[1903] 2 K.B. 148		601

Price *v.* Rhondda U. D. C.	[1923] 2 Ch. 372; 130 L.T. 156	*R.*	221
Prince Blücher, *In re*	[1931] 2 Ch. 70	*Dist.*	551, 557
Ralli Bros. *v.* Compania Naviera Sota y Aznar	[1920] 2 K.B. 287		96
Randall *v.* Newson	2 Q.B.D. 102		600
Rankin *v.* Potter	L.R. 6 H.L. 83		95
Rawlance *v.* Croydon Corporation	[1952] 2 Q.B. 803	*R.*	150, 153, 157
Read *v.* J. Lyons & Co. Ld.	[1947] A.C. 156	*R.*	626
Reg. *v.* Azzopardi	1 C. & K. 203	*R.*	176
Reg. *v.* Blenkinsop	[1892] 1 Q.B. 43		180
Reg. *v.* Brighton and Area Rent Tribunal; *Ex p.* Slaughter	[1954] 1 Q.B. 446	*Appl.*	456, 459
Reg. *v.* Cowper	24 Q.B.D. 60; 533	*C.*	551, 559, 564
Reg. *v.* Daniell	6 Mod. 99, 182	*R.*	166
Reg. *v.* Folkestone and Area Rent Tribunal	[1954] 1 Q.B. 454	*R.*	452
Reg. *v.* Middlesex Justices	2 Q.B.D. 516	*R.*	3
Reg. *v.* Middlesex Quarter Sessions, *Ex p.* Director of Public Prosecutions	[1952] 2 Q.B. 758		4
Reg. *v.* Minister of Housing and Local Government, *Ex p.* Corporation of London	[1953] 2 Q.B. 83	*Rev.*	140
Reg. *v.* Norfolk Quarter Sessions, *Ex p.* Brunson	[1953] 1 Q.B. 503	*R.*	7
Reg. *v.* Payne	[1896] 1 Q.B. 577, 580, 582	*E.*	579, 585
Reg. *v.* Pearce	5 Q.B.D. 386	*R.*	80
Reg. *v.* Price	5 Q.B.D. 300	*R.*	183, 184, 190
Reg. *v.* Serva	2 C. & K. 53	*R.*	175
Reg. *v.* Wilson	6 Q.B. 620	*R.*	3
Reg. *v.* Worcestershire Justices	3 E. & B. 477		3
Regional Properties Co. Ld. *v.* Frankenschwerth	[1951] 1 K.B. 631		265
Rex *v.* All Saints, Southampton	7 B. & C. 785	*R.*	14
Rex *v.* Bassey	47 T.L.R. 222	*C.*	158
Rex *v.* Benn and Church	6 Term R. 198	*R.*	189
Rex *v.* Birmingham (West) Rent Tribunal, *Ex p.* Edgbaston Investment Trust Ld.	[1951] 2 K.B. 54		542
Rex *v.* Bolam, *Ex p.* Haigh	93 S.J. 220	*R.*	583, 585
Rex *v.* Brailsford	[1905] 2 K.B. 730	*C.*	158, 167, 168
Rex *v.* Carnarvon Justices	4 B. & Ald. 86		4
Rex *v.* Deparde	1 Taunt. 26		172
Rex *v.* Editor of the Daily Mail	44 T.L.R. 303		582
Rex *v.* Editor of New Statesman	44 T.L.R. 301	*R.*	584
Rex *v.* Epsom and Ewell Rent Tribunal; *Ex p.* Tucker	111 J.P.N. 487		458
Rex *v.* Fulham, Hammersmith and Kensington Rent Tribunal, *Ex p.* Zerek	[1951] 2 K.B. 1	*Appl.*	8, 13, 14
Rex *v.* Fulham, Hammersmith and Kensington Rent Tribunal; *Ex p.* Gormly	[1952] 1 K.B. 179		441
Rex *v.* Helsham	4 C. & P. 394	*R.*	176
Rex *v.* Higgins	2 East 5	*R.*	167, 168
Rex *v.* Manley	[1933] 1 K.B. 529	*Q.*	159, 161, 168
Rex *v.* Neal	[1949] 2 K.B. 590	*R.*	169
Rex *v.* Newport (Salop) Justices, *Ex p.* Wright	[1929] 2 K.B. 416		64
Rex *v.* Northumberland Compensation Appeal Tribunal, *Ex p.* Shaw	[1952] 1 K.B. 338	*R.*	4
Rex *v.* Oxfordshire Justices	(Not reported)		7
Rex *v.* Porter	[1910] 1 K.B. 369	*C.*	158, 167, 168
Rex *v.* Sawyer	Russ. & Ry. 294; 2 C. & K. 101	*R.*	175
Rex *v.* Stirling	1 Lev. 126	*R.*	166

Rex *v.* The Chancellor of St. Edmundsbury and Ipswich Diocese	[1947] K.B. 263	*R.*	186
Rex *v.* Young	30 Cr.App.R. 57		162
Richardson *v.* Maitland	34 S.L.R. 426		464
Rickards *v.* Forestal Land, Timber and Railways Co. Ld.	[1942] A.C. 50	*R.*	100
Ritz Cleaners Ld. *v.* West Middlesex Assessment Committee	[1937] 2 K.B. 642	*R.*	85
R.M.R. Housing Society *v.* Combs	[1951] 1 K.B. 486		265
Robert Addie & Sons (Collieries) Ld. *v.* Dumbreck	[1929] A.C. 358	*R.*	203
Robert Addie & Sons (Collieries) Ld. *v.* Dumbreck	[1929] A.C. 358	*R.*	335, 339, 340
Roberts *v.* Metropolitan Borough of Battersea	110 L.T. 566	*R.*	187
Robertson *v.* Petros M. Nomikos Ld.	[1938] 2 K.B. 603; [1939] A.C. 371	*R.*	102, 104, 126, 138
Robinson, *In re*	[1911] 1 Ch. 502	*R.*	417
Rodoconachi *v.* Elliott	L.R. 9 C.P. 518	*R.*	97
Rose *v.* Hurst	[1949] 2 K.B. 372		528
Roura & Forgas *v.* Townend	[1919] 1 K.B. 189	*R.*	125, 139
Russian Bank for Foreign Trade *v.* Excess Insurance Co. Ld.	[1918] 2 K.B. 123; [1919] 1 K.B. 39	*C.*	89, 122, 124–7, 138–9
Russoff *v.* Lipovitch	[1925] 1 K.B. 628	*R.*	259
Rylands *v.* Fletcher	L.R. 3 H.L. 330		569
Salberg *v.* Morris	4 T.L.R. 47		368
Salomons, *In re*	[1920] 1 Ch. 290		593
Samuel (P.) & Co. *v.* Dumas	[1924] A.C. 431	*R.*	108, 138
Saunders *v.* Freeman	1 Plowd. 209	*R.*	234
Saunders *v.* Richardson	7 Q.B.D. 388	*Appl.*	61, 65, 69
Sawyer and Withall, *In re*	[1919] 2 Ch. 333		145
Scarfe *v.* Morgan	4 M. & W. 270		466
Schebsman, *In re*	[1944] Ch. 83		265
Schmaltz *v.* Avery	16 Q.B. 655	*C.*	46, 51
Scott *v.* Shepherd	3 Wils. 403	*R.*	198
Scott *v.* Shepherd	2 W.Bl. 892; 1 Sm. L.C., 13th ed., 513	*R.*	621
Seaman *v.* Burley	[1896] 2 Q.B. 344		192
Searle *v.* Wallbank	[1947] A.C. 341	*R.*	624, 627, 633
Sedleigh-Denfield *v.* O'Callaghan	[1940] A.C. 880	*R.*	336
Seligman *v.* Docker	[1949] Ch. 53		378
Sharman *v.* Brandt	L.R. 6 Q.B. 720	*R.*	48
Sheffield Corporation *v.* Anderson	64 L.J.M.C. 44	*Appl.*	360, 362, 363, 365, 366
Shenton *v.* Tyler	[1939] Ch. 620	*R.*	286
Shrewsbury's (Countess of) Case	5 Co.Rep. 13b	*R.*	21
Sidery *v.* Evans and Peters	55 T.L.R. 54		55
Simmonds *v.* Newell	[1953] 1 W.L.R. 826	*R.*	588
Simmonds *v.* Newell	[1953] 1 W.L.R. 826	*C.*	2
Simon *v.* Pawsons & Leafs Ld.	38 Com.Cas. 151	*R.*	39
Simpson *v.* Bloss	7 Taunt. 246	*R.*	32, 38
Small *v.* Nairne	13 Q.B. 844	*R.*	21
Smith and Snipes Hall Farm Ld. *v.* River Douglas Catchment Board	[1949] 2 K.B. 500	*R.*	270, 275
Smith, *In re*	42 Ch.D. 302		594
Smith *v.* Cook	1 Q.B.D. 79	*R.*	621, 633
Smith *v.* Critchfield	14 Q.B.D. 873	*Dist.*	367, 371–4
Solle *v.* Butcher	[1950] 1 K.B. 671		416
South Wales Miners' Federation *v.* Glamorgan Coal Co. Ld.	[1905] A.C. 239	*R.*	166, 269
Southcote *v.* Stanley	1 H. & N. 247	*R.*	330, 332
Southgate Borough Council *v.* Park Estates (Southgate) Ld.	[1953] 1 W.L.R. 1274	*Aff.*	360
Sparks' Lease, *In re*, Berger *v.* Jenkinson	[1905] 1 Ch. 456		265

Star *v.* Rookesby	1 Salk. 335	*R.*	621
Steedman *v.* Drinkle	[1916] 1 A.C. 275	*C.*	477, 486, 487, 490, 491, 498–500
Stimpson *v.* Standard Telephones and Cables Ld.	[1940] 1 K.B. 342		387
St. James's Evening Post Case	2 Atk. 469	*F.*	579, 584, 585
Stromdale & Ball Ld. *v.* Burden	[1952] Ch. 223	*R.*	272, 274
Summers *v.* Roberts	[1944] K.B. 106	*R.*	83, 84
Sumpter *v.* Hedges	[1898] 1 Q.B. 673		430
Sunley & Co. Ld. *v.* Cunard White Star Ld.	[1939] 2 K.B. 791		298
Swanson *v.* Forton	[1949] Ch. 143	*R.*	262
Sweetman *v.* Guest	L.R. 3 Q.B. 262	*R.*	184, 190
Tatem (W. J.) Ld. *v.* Gamboa	[1939] 1 K.B. 132		96
Theyer *v.* Purnell	[1918] 2 K.B. 333	*R.*	623
Thurogood *v.* Van Den Berghs and Jurgens Ld.	[1951] 2 K.B. 537		617
Tillett *v.* Ward	10 Q.B.D. 17	*R.*	626
Tinline *v.* White Cross Insurance Association Ld.	[1921] 3 K.B. 327	*C.*	30, 39, 44
Truman, Hanbury, Buxton & Co. Ld. *v.* Kerslake	[1894] 2 Q.B. 774	*Dist.*	140, 149, 150, 153, 157
Turnbull, Martin & Co. *v.* Hull Underwriters Association	[1900] 2 Q.B. 402	*R.*	124
Turner *v.* Watts	44 T.L.R. 105	*Dist.*	399, 404–6, 408, 409
Tweddle *v.* Atkinson	1 B. & S. 393	*Dist.*	251, 273, 274
Vickery *v.* Martin	[1944] K.B. 679		448
Victoria Laundry (Windsor) Ld. *v.* Newman Industries Ld.; Coulson & Co. Ld. (Third Parties)	[1949] 2 K.B. 528	*R.*	300
Victoria Motors (Scarborough) Ld. *v.* Wurzal	[1951] 2 K.B. 520	*C.*	53, 55, 58, 59, 60
Vinall *v.* Howard	[1953] 1 W.L.R. 987	*Rev.*	375, 376
Vrondissis *v.* Stevens	[1940] 2 K.B. 90		96
Wallace *v.* Dixon	[1917] 2 I.R. 236	*R.*	83
Walsh *v.* Lonsdale	21 Ch.D. 9	*R.*	472
Watts *v.* Battersea Borough Council	[1929] 2 K.B. 63	*Appl.*	567, 576
Watts, Watts & Co. Ld. *v.* Mitsui & Co. Ld.	[1917] A.C. 227	*R.*	97, 98, 113
Webber *v.* Lee	9 Q.B.D. 315		466
Wedd *v.* Porter	[1916] 2 K.B. 91	*Q.*	15, 16, 18, 20, 21
Weld-Blundell *v.* Stephens	[1919] 1 K.B. 520	*R.*	39
Wells *v.* Fisher	1 M. & Rob. 99	*R.*	287
Whiteley *v.* Wilson	[1953] 1 Q.B. 77	*Appl.*	446, 451, 452, 455
Whiteman Smith Motor Co. *v.* Chaplin	[1934] 2 K.B. 35		528
White *v.* Bijou Mansions	[1937] Ch. 610, 625	*R.*	264, 271
Wickham *v.* Hawker	7 M. & W. 63	*C.*	460, 467
Wilkes *v.* Goodwin	[1923] 2 K.B. 86		265
Williamson *v.* Williamson	L.R. 9 Ch. 729	*R.*	255
Winter *v.* Bartholomew	11 Exch. 704	*R.*	371, 372
Wolfe *v.* Hogan	[1949] 2 K.B. 194		448
Woodward *v.* Oldfield	[1928] 1 K.B. 204	*R.*	425, 426
Wright *v.* Ingle	16 Q.B.D. 379		145
Yerburgh, *In re*	[1928] W.N. 208	*R.*	597
Yorkshire Dale Steamship Co. Ld. *v.* Minister of War Transport	[1942] A.C. 691	*R.*	110, 397

STATUTES JUDICIALLY CONSIDERED

1774

Fires Prevention (Metropolis) Act, 1774 (14 *Geo.* 3, *c.* 78), *s.* 86 **Lord Goddard C.J. 565**

1861

Offences Against the Person Act, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 9 - **C.-M. A.C. 170**

1880

Ground Game Act, 1880 (43 *&* 44 *Vict. c.* 47), *s.* 1 (1) (*b*) - - - **C.A. 460**

1881

Army Act, 1881 (44 *&* 45 *Vict. c.* 58) (*as amended and re-enacted*), *s.* 41. **C.-M. A.C. 170**

1892

Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *s.* 7 (*d*) - - - **C.A. 359**

1893

Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1) (2) - - - **C.A. 598**

—— —— *s.* 53 - - - - **C.A. 292**

1898

Vagrancy Act, 1898 (61 *&* 62 *Vict. c.* 39), *s.* 1 (1) (3) - - - **Divl.Ct. 342**

1905

London Building Acts (Amendment) Act, 1905 (5 *Edw.* 7, *c. ccix*), *s.* 12 **Lord Goddard C.J. 565**

1912

Criminal Law Amendment Act, 1912 (2 *&* 3 *Geo.* 5, *c.* 20), *s.* 7 - **Divl.Ct. 342**

1916

Larceny Act, 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (3) - - - - **Divl.Ct. 70**

1920

Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 8, 14 (1). **C.A. 22**

—— —— *ss.* 12 (1) (*f*) (*g*), 15 (3) **Lynskey J. and C.A. 250**

—— —— *s.* 15 (3) - - - - **C.A. 514**

Seeds Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 54), *ss.* 1, 2 (1), 6 (1) - - **C.A. 29**

1923

Rent and Mortgage Interest Restrictions Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 8 (2). **C.A. 22**

1925

Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 65 (1) - - - - **C.A. 460**

1927

Landlord and Tenant Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5 (1) (2) *and* (5). **C.A. 524**

1930

Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 3 (1) - - - - **C.A. 375**

—— —— *ss.* 61 (1) (2), 72 - **Divl.Ct. 52**

1932

Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 65 - - - - - **C.A. 550**

1933

Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 187 - - **Divl.Ct. 351**

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1) *and Sch.* 1, *paras.* (*a*) *and* (*d*). **Lynskey J. and C.A. 250**

1934

Road Traffic Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 8 (1) - - - - **C.A. 375**

—— —— *s.* 25 - - - - **Divl.Ct. 52**

1937

Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12) - - - - - **C.A. 383**

1938

Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1 (1) (2) *and* (3) - **Devlin J. 288**

Increase of Rent and Mortgage Interest (Restrictions) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 26), *s.* 7 (6) - - **C.A. 22**

1939

Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2 (1), 31 - - - **Divl.Ct. 178**

—— —— *s.* 26 (*a*) (*b*) (*c*) - **Pearson J. 411**

London Building Acts (Amendment) Act, 1939 (2 *&* 3 *Geo.* 6, *c. xcvii*), *ss.* 33, 35, 133, 148 - **Lord Goddard C.J. 565**

Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3). **C.A. 446**

—— —— *s.* 3 (3) - - - - **C.A. 514**

1944

Education Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *s.* 39 - - - - - **Divl.Ct. 61**

—— —— *ss.* 54 (6), 114 (1) - **Divl.Ct. 420**

1946

Furnished Houses (*Rent Control*) *Act*, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2 (1). **Divl.Ct. 456**

—— —— *s.* 4 - - - - - - **C.A. 506**

—— —— *s.* 4 (1) (*a*) - - **Divl.Ct. 439**

Statutory Instruments Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 36), *ss.* 2, 3 - **Streatfeild J. 586**

1947

Agriculture Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *s.* 98 - - - - - **C.A. 460**

Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 19 (1), 119 (1). **C.A. 140**

1948

Local Government Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 33, 40 - - **Divl.Ct. 351**

1949

Landlord and Tenant (*Rent Control*) *Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1 - **C.A. 446**

—— —— *s.* 2 (5) - - - - **C.A. 22**

—— —— *ss.* 2 *and* 3 - - - **C.A. 539**

1950

Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *s.* 74. **C.A. 77**

1951

Leasehold Property (*Temporary Provisions*) *Act*, 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *ss.* 10 (1) (2) (4), 20 - - **C.A. 77**

1953

Prevention of Crime Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 14), *s.* 1 (1) - - **C.C.A. 503**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Domestic Pottery (*Manufacture and Supply*) *Order*, 1947 (*S.R. & O.* 1947, *No.* 373) - - - - **C.C.A. 158**

Domestic Pottery (*Manufacture and Supply*) (*Amendment*) *Order*, 1948 (*S.I.* 1948, *No.* 1616) - - - **C.C.A. 158**

Motor Vehicles (*Construction and Use*) *Regulations*, 1951 (*S.I.* 1951, *No.* 2101). **C.A. 375**

Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 *and* 1907 (*S.R. & O.* 1908, *No.* 1312). **C.A. 383**

R.S.C. Ord. 16, *r.* 9 - - - **C.A. 210**

R.S.C., *Ord.* 57, *r.* 16A - - **C.A. 367**

Statutory Instruments Regulations, 1947 (*S.I.* 1948, *No.* 1), *reg.* 7 - **Streatfeild J. 586**

CASES
DETERMINED BY THE
QUEEN'S BENCH DIVISION
OF THE
HIGH COURT OF JUSTICE
AND BY THE
COURT OF APPEAL
ON APPEAL THEREFROM
OR FROM COUNTY COURTS
AND BY THE
COURT OF CRIMINAL APPEAL

REGINA *v.* CHAIRMAN, COUNTY OF LONDON QUARTER SESSIONS. *Ex parte* DOWNES.

1953
July 23, 24.

Lord Goddard C.J., Parker and Donovan JJ.

Criminal Law — Procedure — Indictment — Plea before arraignment —Allegation that evidence on deposition insufficient to support a conviction—Whether power to quash indictment—Quarter sessions —Mandamus—Certiorari.

Indictments charging the defendants with offences under the Iron and Steel Prices Order, 1951, as amended, and regulation 55AB of the Defence (General) Regulations, 1939, came before the London Sessions. Before arraignment counsel for the defendants moved to quash the indictments on the ground that if the depositions were examined it would be found that the evidence for the prosecution would be insufficient to support a conviction having regard to the decision in *Simmonds* v. *Newell* [1953] 1 W.L.R. 826; [1953] 2 All E.R. 38. The chairman accepted the submission and quashed the indictments. The prosecutor moved for orders of mandamus and certiorari commanding sessions to hear and determine the indictments, and to bring up and quash the order purporting to quash them:—

Held, granting orders of mandamus, that sessions had no power to quash the indictments because it was anticipated that the evidence would not support the charges. The only ground on which a court

---

[Reported by Miss C. J. Ellis, Barrister-at Law.]

1953

REGINA
v.
CHAIRMAN,
COUNTY OF
LONDON
QUARTER
SESSIONS.
Ex parte
DOWNES.

could examine depositions before arraignment was to see whether, if a count was included for which there had not been a committal, the depositions or examinations taken before a justice in the presence of the accused disclosed that offence.

Held, refusing orders of certiorari, that having granted orders for mandamus it was not necessary to grant orders of certiorari and therefore unnecessary to decide whether certiorari would issue.

MOTIONS for certiorari and mandamus.

Indictments came before the County of London Quarter Sessions charging the defendants with offences under the Iron and Steel Prices Order, 1951, as amended, and regulation 55AB of the Defence (General) Regulations, 1939. Before arraignment counsel for the defendants moved to quash the indictments on the ground that if the depositions were examined it would be found that the evidence for the prosecution was insufficient to support a conviction. Having examined the depositions, the chairman announced that the indictments would be quashed on the ground that, having regard to the decision of the Divisional Court in *Simmonds* v. *Newell*; *Defiant Cycle Co. Ld.* v. *Same*; and *MacNay* v. *Same*,[1] the prosecution would not be able to obtain a conviction as there was insufficient evidence to show that the statutory instruments, the breaches of which formed the substance of the indictments, had been duly published or brought to the knowledge of the defendants.

The prosecutor moved for orders of certiorari and mandamus directed to the London Sessions to bring up and quash the orders whereby sessions purported to quash the indictments and commanding the sessions to hear and determine the indictments according to law.

Sir Reginald Manningham-Buller Q.C., S.-G., J. P. Ashworth and *Edward Clarke* for the applicant. The chairman had no jurisdiction to quash the indictments, and mandamus should issue. The only ground for quashing an indictment because there is insufficient evidence on the depositions is where a count has been added or substituted in the indictment for which there has been no committal. An order of certiorari will issue against quarter sessions: *Reg.* v. *Norfolk Quarter Sessions; Ex parte Brunson.*[2]

R. F. Levy Q.C. and *Neville Faulks* for the respondents,

---

[1] [1953] 1 W.L.R. 826; [1953] 2 All E.R. 38.

[2] [1953] 1 Q.B. 503; [1953] 2 W.L.R. 294; [1953] 1 All E.R. 346.

Howard & Partners and Helical Bar Engineering Co. The court has no power to grant orders of certiorari or mandamus in such a case as this. Mandamus only lies where quarter sessions have refused to hear a case, but it is submitted that quarter sessions have heard the present case. The officer of the court who draws up an indictment has power to omit an original charge, if the evidence does not cover it, under proviso (i) to section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, which provides that where a person has been committed for trial the bill of indictment may include "either in substitution "for" or in addition to the offence charged any counts founded on facts or evidence disclosed in the depositions. If the officer of the court has power to omit a charge in settling an indictment, the court itself cannot have less power. A judge has power to look at depositions and if they do not disclose evidence of a charge he can quash the indictment. The matter has never arisen before, but there is no authority to say that a judge has no such power.

"A writ of mandamus will not issue to a court of quarter "sessions in respect of any matter in which it has exercised its "jurisdiction": Halsbury's Laws of England, 2nd ed., vol. 21, p. 738. The question is whether the chairman in quashing the indictments was declining jurisdiction or exercising it. It is submitted that the chairman accepted jurisdiction and was taking one step in its exercise by quashing the indictments: *Reg.* v. *Worcestershire Justices*[3]; *Reg.* v. *Middlesex Justices*.[4] Certiorari is unnecessary in the present case since there is no order for costs to be quashed as in the *Norfolk* case.[5] [Reference was also made to *Reg.* v. *Wilson*.[6]]

Sebag Shaw for P. J. C. Daniels adopted Mr. R. F. Levy's argument.

F. H. Lawton for J. H. Sully and North London Metal Ld. The argument which was put before the chairman in the court below was that the court must have power over its own proceedings. An officer of the court has power to examine depositions before he signs a bill of indictment. If there is any doubt whether the bill should be signed, the chairman or judge has to decide: proviso to section 2 (1) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. When the chairman looks at the depositions he may discover a fatal mistake, and in that case if he allows the indictment to be heard the court will be wasting its time, whereas if he quashes the indictment the prosecution may look for other evidence. If the chairman continues with the case and is wrong in so doing, and there is an acquittal, then there is nothing that this court can do to remedy the matter: *Reg.* v. *Middlesex Quarter Sessions; Ex parte Director of Public Prosecutions.*[7]

---

[3] (1854) 3 E. & B. 477.

[4] (1877) 2 Q.B.D. 516.

[5] [1953] 1 Q.B. 503.

[6] (1844) 6 Q.B. 620.

Henry S. Ruttle for Harwin Shipping Agency Ld. and *Victor Durand* for Everett both adopted Mr. R. F. Levy's argument.

Sigmund Rappaport appeared in person.

Industrial and International Agencies were not represented and did not appear.

Sir Reginald Manningham-Buller Q.C., S.-G., in reply. Both certiorari and mandamus will lie. The whole question of certiorari was examined in *Rex* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw.*[8] The only order in the present case is that which is written on the indictment, i.e., indictment quashed. But the quashed indictment is a speaking order and one can look at the whole of the indictment. It is therefore clear from the face of the record that there is an error. This court must have inherent jurisdiction to quash an order of an inferior court which amounts to a refusal by the inferior court to try the case. [*Rex* v. *Carnarvon Justices*[9] was also referred to.]

LORD GODDARD C.J. stated the facts and continued: The questions which arise are whether the London Sessions had any power to act in the manner in which they did, and, if not, what steps, if any, this court can take to compel the sessions to try the case.

No member of this court has ever known or heard of a court quashing an indictment in such circumstances, nor can authority be found to support it. It is said, however, that the court must have power at common law to quash an indictment if satisfied, from a perusal of the depositions, that there must be an acquittal in the end. This seems to ignore entirely the method by which an indictment comes before a court of trial. At common law any person could prefer an indictment to the grand jury and seek a presentment on the information he could give by himself or by witnesses. It was unnecessary to have any depositions at all.

---

[7] [1952] 2 Q.B. 758; [1952] 2 T.L.R. 135; sub nom. *Reg.* v. *Middlesex Justices; Ex parte Director of Public Prosecutions* [1952] 2 All E.R. 312.

[8] [1952] 1 K.B. 338; [1952] 1 T.L.R. 161; [1952] 1 All E.R. 122.

[9] (1820) 4 B. & Ald. 86.

Depositions as at present understood are entirely the creation of the Indictable Offences Act, 1848, though before that Act, no doubt, justices took statements from witnesses in the absence of the accused and also examined him and returned the examinations to the court of trial. A grand jury acted on any evidence which they saw fit to admit and could, and constantly did, act on their own knowledge. The sonorous and stately oath (which, unfortunately, is no longer heard after the opening of the commission at the assizes) required the grand jurors diligently to inquire and true presentment make of all such offences, matters and things which were given them in charge or might otherwise come to their knowledge. If anyone takes the trouble to read the old sessions papers published by various counties from time to time, he will find that they are full of cases down to the reign of Queen Victoria of the grand jury presenting all manner of things to the court which in those days was really the origin of local government for the county in such matters as roads, which they knew to be out of repair, bridges which were in a dangerous condition, public nuisances, disorderly houses, gaming houses and the like, either of their own knowledge, or from information given to them.

Once a presentment was made, so that the bill became an indictment, the court had to try it unless the alleged offence was unknown to the law or was imperfectly set out so that it would have been bad on error, or unless matter in bar was alleged by plea, in which case the plea in bar had, and still has, to be tried. Objection to the matter or form of the indictment could be taken by motion to quash, or less usually by demurrer. The only question then was whether the indictment was good in substance and form, and not whether the evidence which had been before the grand jury would support it. Indeed, the grand jury's oath obliged them to keep all their proceedings secret: "The King's "counsel, your own, and your fellows', you shall observe and "keep secret." As, however, the liberty of any individual to present a bill was liable to abuse, the Vexatious Indictments Act, 1859, limited the right of the private prosecutor to prefer a bill for certain specified alleged offences.

When the grand jury was abolished in 1933 committal for trial was substituted for presentment, although provision is made in the Act for enabling any person to prefer a bill by leave of a judge. The signing of the bill by the proper officer of the court is equivalent to presentment, and if the accused has been formally committed for trial the officer must sign it, though if he is in doubt whether the committal was regular the matter must be decided by the presiding judge. If he decides that it is irregular, no doubt his ruling would have the same effect as the ignoring of a bill by the grand jury. Once an indictment is before the court the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a nolle prosequi is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment disclosed an offence which a particular court has no jurisdiction to try, for example, an indictment at sessions for an offence punishable with imprisonment for life in the first instance.

I know of no power in the court to quash an indictment because it is anticipated that the evidence will not support the charge. The only ground on which the court can examine the depositions before arraignment is to see whether, if a count is included for which there has not been a committal, the depositions or examinations taken before a justice in the presence of the accused disclosed that offence.

Accordingly, the course taken by the sessions in this case was not warranted by law; it amounts to saying that the court has satisfied itself, not on evidence given before the court but on depositions taken elsewhere, that the accused has a defence. Moreover, if this course were permissible, it would enable a court, the members of which disapproved of or disliked a statute, the breach of which formed the subject of the indictment, simply to quash it and decline to try it.

It is, of course, well known to every practitioner that, if the prosecution is satisfied that there is a good defence to the charge or that for some reason it is inadvisable to proceed, it is permissible, with the leave of the court after issue joined, to offer no evidence, when a verdict of acquittal will be directed. Again, if there were more than one indictment against a prisoner it is quite common practice, after the trial of one of them, to direct that the other or others are to remain on the file and not to be prosecuted without leave.

I would also add that it often happens (and, indeed, we were told it was so in this case) that the prosecution intend to call evidence in addition to that given before the court of committal. This they are entitled to do, and though modern practice requires at least, if it involves the calling of additional witnesses, that notice of the fresh evidence should be given, there is no statutory requirement to this effect.

The question then arises as to what, if anything, this court can do to correct the error into which the sessions have fallen. I feel no doubt that an order of mandamus to hear and determine the indictment can issue. The sessions in effect have refused to try the case. No one suggests that the indictment does not disclose an offence, or that it is not good in form, or that the sessions had no jurisdiction to try it. They cannot quash because they are of opinion that the accused have a defence. They must try the case.

This court has on several occasions sent an order of mandamus to sessions where they have declined to proceed. A recent instance was *Rex* v. *Oxfordshire Justices*, which is not reported, but I was a member of the court, where the sessions held that they had no power to try a charge of dangerous driving on indictment as the defendant had not elected to go for trial, and in *Reg.* v. *Norfolk Quarter Sessions; Ex parte Brunson*,[1] where the court declined to proceed because some inadmissible evidence had been given before the committing justices. In both those cases the court, by order of mandamus, directed the sessions to hear and determine.

With regard to certiorari, the question is by no means so clear, and I may refer to a recent note by Mr. D. M. Gordon in the Law Quarterly Review, vol. 69, p. 175. It seems that when sessions are sitting as a court of oyer and terminer to try prisoners on indictment certiorari will not lie to bring up a judgment either of acquittal or conviction. The quashing of an indictment is not a judgment of acquittal, nor a fortiori of conviction. It is true that in the *Norfolk* case,[1] where this point was not taken, this court did order certiorari to issue both for the order quashing the indictment and for the order as to costs. It may be that had this point been taken the court would have confined the certiorari to the order for costs. But in truth I do not think that any certiorari is necessary, so that we need not consider the cases and learning on this subject. The court by its order of mandamus will direct the sessions to try the indictments, so it would be eminently futile to take the objection that they have made an order quashing them. It is just because they have made that order that the court directs them to try the case, thus in effect directing them to ignore the order they have made.

[1] [1953] 1 Q.B. 503; [1953] 2 W.L.R. 294; [1953] 1 All E.R. 346.

1953

REGINA
v.
CHAIRMAN,
COUNTY OF
LONDON
QUARTER
SESSIONS.
Ex parte
DOWNES.

The order of mandamus will go, and the defendants will pay the costs of the application.

PARKER J. I entirely agree.

DONOVAN J. I agree.

Orders of mandamus granted.
Orders of certiorari refused.

Solicitors: *Treasury Solicitor; Capel Cure, Glyn Barton & Co.; Lewis Lloyd & Co.; Wontner & Sons; Mellows & Mellows; Hart-Leverton & Co.*

1953
Oct. 5, 7.

Devlin J.

CHRISTOPHER BROWN LD. *v.* GENOSSENSCHAFT OESTERREICHISCHER WALDBESITZER HOLZWIRTSCHAFTSBETRIEBE REGISTRIERTE GENOSSENSCHAFT MIT BESCHRANKTER HAFTUNG.

[1952 C. 3851.]

Arbitration—Jurisdiction—Arbitrator's inquiry into own jurisdiction—Effect on award.

Arbitrators whose jurisdiction is challenged are entitled to make their own inquiries into the question whether or not they have jurisdiction in order to determine their own course of action, although the result of their inquiry can have no effect on the rights of the parties. Their award is in no way affected by the fact that it expressly or impliedly refers to a finding by the arbitrators as to their jurisdiction.

Rex v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* [1951] 2 K.B. 1; [1951] 1 T.L.R. 423; [1951] 1 All E.R. 482 applied.

ACTION.

By an award dated February 1, 1952, made by arbitrators appointed pursuant to the plaintiffs' and defendants' submission contained in a contract between them of December 22, 1950, the defendants (the sellers) were ordered to pay the sum of £1,650 to the plaintiffs (the buyers). The award stated that a dispute had arisen between the parties "regarding the execution of "the contract." The plaintiffs brought an action to recover the amount of the award, which they alleged the defendants had wrongfully failed to pay. In their defence the defendants alleged that the contract was not a binding one as the parties had never been ad idem, from which it would follow that the submission contained in it was also not binding on them and the award would be valueless.

At the trial, in which the defendants did not appear and were not represented, the plaintiffs called evidence to show what in fact the dispute before the arbitrators had been. That evidence showed that the plaintiffs were seeking damages for the sellers' non-delivery of the contract goods; that the arbitrators had before them correspondence which showed that the defendants were contending that the contract was not binding; and that the arbitrators decided that it was binding and then proceeded to determine the other matters in dispute in favour of the plaintiffs.

I. H. Jacob, for the plaintiffs, cited *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek* [1]; *Falkingham* v. *Victorian Railways Commissioner*,[2] and *Mayor of London* v. *Cox*.[3]

Cur. adv. vult.

Oct. 7. DEVLIN J. [after stating the facts]: The matters which the plaintiffs have to prove in order to succeed are, first, the making of the contract which contains the submission, secondly, that the dispute arose within the terms of the submission, thirdly, that arbitrators were appointed in accordance with the clause which contains the submission, fourthly, they must prove the making of the award, and lastly, that the amount awarded has not been paid. They do not in this task get any substantial assistance from the many admissions in the defence. The defence alleges that there was no contract at all, and what admissions the defendants make are implied rather than expressed, and are guarded by the general denial clause which provides that they must be taken as denying anything that they do not expressly admit. At any rate, the plaintiffs have undertaken to prove all these matters, and as to four of them they have offered clear proof. The only one which gives rise to any doubt is the second that I have mentioned, whether the dispute which arose was within the submission.

That doubt arises in this way. In the course of proving their case the plaintiffs naturally produce the award on which they are suing, which reads: " A dispute having arisen . . . regarding the

---

[1] [1951] 2 K.B. 1; [1951] 1 T.L.R. 423; [1951] 1 All E.R. 482.

[2] [1900] A.C. 452.

[3] (1867) L.R. 2 H.L. 239.

"execution of the contract dated December 22, 1950"—it then sets out that the matter has been referred to the arbitrators and continues: "Having carefully examined the documents and correspondence relating to the dispute we, the undersigned, hereby determine and award that the sellers shall pay to the buyers the sum of £1,650." The arbitrators then direct that the costs of the arbitration shall be paid as to half by the buyers, that is the plaintiffs, and as to half by the sellers. The award, therefore, recites the dispute as being a dispute regarding "execution" of the contract and, of course, if that means execution in the sense of the making of the contract, then it would be a dispute which the arbitrators would have no power to determine or award upon at all. The arbitration clause provides for disputes arising under the contract but, of course, quite apart from that the contract contains the submission, and if the contract was never validly made then there is no submission, and the arbitrators are stripped of any authority or, put more accurately, no authority was ever conferred upon them to hear the dispute. This naturally directs attention to that word and to the fact that the defendants in their defence are denying that the contract was validly made and was binding upon them.

The word "execution" is, I think, an ambiguous word. It has been argued by Mr. Jacob for the plaintiffs that what it should be taken to mean in its place in the award is not "execution" in the sense of the making of the contract, but "execution" in the sense of the performance or carrying out of the contract. In law, as well as in the ordinary use of terminology, one talks of an executed contract or an executory contract as meaning a contract which has been fully performed or has not been fully performed. In that sense I think that the word is ambiguous, and there is no doubt that the principle to apply is that the court should endeavour in its construction of the document to uphold the validity of the award rather than to destroy it. It might be, therefore—and I say no more than it might be—that the word in its place in the award should be given the interpretation for which the plaintiffs contend.

But Mr. Jacob, I think very rightly, did not elect to rely on that, but preferred to tender evidence to show what, in fact, was the dispute which came before the arbitrators. I think that such evidence was clearly admissible. It would be admissible, I think, to resolve the ambiguity in the award itself, but better ground for admitting it is that the nature of the dispute is something which has to be determined outside the award and outside whatever may be said about it in the award. What is said or implied about it in the award is not conclusive one way or the other; it is a fact which has to be proved by evidence extrinsic to the award. In those circumstances the arbitrator who was appointed by the plaintiffs, a Mr. Gain, was called to give evidence about what the dispute was and what was referred to them, and I can summarize his evidence in this way. In the first place, Mr. Gain was never formally appointed and there was no formal reference as far as he was concerned. He was appointed by being called up on the telephone, and asked whether he would act.

That telephone call was followed up on the same day by a letter of December 5, 1951, from the plaintiffs, in which they set out to him what their points really were in relation to the dispute. They enclosed the contract and the correspondence relating to it, and they wrote, "We should be obliged if you would proceed "to arbitration on our behalf," and they set out the particular points which they wanted him to consider and their arguments about it. The letter cannot, I think, be regarded in any way as defining the area of dispute, but what it does is to indicate the nature of some of the matters which were in dispute from the plaintiffs' point of view. It makes it plain that the plaintiffs' cause of action as it would have been formulated in more legal proceedings was for damages for non-delivery of the timber which they had contracted to buy, and non-delivery by the dates specified in the contract, and they anticipated that that claim would be met by various defences which they thought might be set up by the sellers. The main one appears to have been that the sellers could not get an export licence or could not get their export licence renewed and consequently might rely on the force majeure clause. There was also the possibility that they might contend that certain terms as to the furnishing of a letter of credit which were part of the obligation of the buyers had not been fulfilled, and the letter considers these points.

Mr. Gain was appointed by the plaintiffs, but the defendants did not appoint an arbitrator and, accordingly, under the terms of the submission, the President of the Timber Trades Federation was called upon to appoint one for the defendants, and he appointed a Mr. James. The two arbitrators met and considered the matter several times, and they looked at the whole of the correspondence with which they had been furnished. The correspondence indicated points which I have mentioned, and indicated also that the defendants were contending that the contract was not valid and was not binding upon them. I am satisfied that the arbitrators gave consideration to that point among others. I am satisfied that they went into the question, so far as they could go into it with the correspondence, whether the contract was binding, and they decided that it was, and having decided that it was they went on to determine the other matters likewise in favour of the plaintiffs. I am satisfied, however, that when the word "execution" was put into the draft award it was not put in with the intention of referring merely to the making of the contract, but that it was intended to refer to the performance or carrying out of the contract. Whether the intention of the arbitrator had any materiality on that point, I do not know, but so far as it is a question of fact, I find that this part of the award was drafted by Mr. Gain, and that when he used the word "execution" he intended to use it in the sense of performance.

That is how the matter stands on the facts. If the facts had shown that the only dispute which the arbitrators had considered was the dispute whether the contract was validly made or not, then, of course, the award would have been valueless. The arbitrators cannot determine their own jurisdiction. The question which has arisen is what is the position if the dispute embraced not merely the question of whether the contract was validly made or not, which would be in excess of the jurisdiction of the arbitrators to determine, but also other questions which they could properly determine. I think that the answer to that question becomes clear if one bears in mind the fundamental principles which govern the acts of arbitrators in these matters.

It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties—because that they cannot do—but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties. That is plain, I think, from the burden that is put upon a plaintiff who is suing upon an award. He is obliged to prove not only the making of the award, but also that the arbitrators had jurisdiction to make the award. The principle omnia praesumuntur rite esse acta does not apply to proceedings of arbitration tribunals or, indeed, to the proceedings of inferior tribunals of any sort. There is no presumption that merely because an award has been made it is a valid award. It has to be proved by the party who sues upon it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively.

If the plaintiff takes upon himself the burden of proving the award, and fails to prove that the arbitrators had jurisdiction, his action fails, and it is irrelevant whether the arbitrators thought or did not think that they had jurisdiction. Their finding is of no value to him. But if he proves that the arbitrators did have jurisdiction then he succeeds, and his success is not destroyed because the arbitrators themselves went into the matter and came to the same conclusion which, ex hypothesi, was the right one. In short, any view which is expressed by the arbitrators expressly or impliedly in the award, any finding which can be called a finding that they had jurisdiction does not make the award any better, and likewise does not make it any worse.

This approach to the matter and the principles to which I have referred are, I think, substantially those which were laid down in the judgments in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek*,[1] which was a decision of the Divisional Court. The court there was considering a similar question in relation to a rent tribunal and the circumstances in which a rent tribunal could properly inquire into matters affecting its own jurisdiction. I think that the same principles apply to an arbitration tribunal. That is shown by a short passage to which Mr. Jacob referred me in *Falkingham* v. *Victorian Railways Commissioner.*[2] The Privy Council was there considering a contention that the award was bad because the arbitrators had considered claims which they were not authorized to consider as well as claims which they were authorized to consider. Lord Davey, delivering the advice of the Judicial Committee, said[3]: "Their Lordships are not aware of any authority for this position, "and they think it would be contrary to principle to hold an "award bad because the possibility that matters not within the "jurisdiction of the arbitrators may have been taken into account "is not in terms excluded on the face of the award. It is true "that in inferior courts the maxim 'Omnia praesumuntur rite esse "acta' does not apply to give jurisdiction, as was laid down by the "Court of Queen's Bench in *Rex* v. *All Saints, Southampton,*[4] "and by Willes J. in *Mayor of London* v. *Cox.*[5] That rule is "applicable to the award of an arbitrator where no jurisdiction "is shown to make the award, but where, as in the present case, "there is jurisdiction to make an award, and the question is only "of a possible excess of jurisdiction, it has no application. In "such a case the award can only be impeached by showing that "the arbitrator did in fact exceed his jurisdiction." *Mayor of London* v. *Cox*[5] was the authority, or one of the authorities, likewise relied on in *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, ex parte Zerek,*[6] and I am satisfied that the same principle which applies to inferior tribunals generally, as laid down in that case, ought to be applied to arbitration tribunals as well.

---

[1] [1951] 2 K.B. 1; [1951] 1 T.L.R. 423; [1951] 1 All E.R. 482.

Thus the question becomes simply this: have the plaintiffs discharged the burden of proving that the arbitrators had jurisdiction? If they have, then what the arbitrators may have thought about it, or may have inquired into about it, is irrelevant. In my judgment, the plaintiffs have discharged that burden. It is indeed the very issue of the case, and would have been the very issue of the case if it had been fought. They have proved the contract; they have proved that the contract contained a submission; and they have proved that the submission was apparently duly signed. They have thus discharged all that they are required to do by tendering prima facie proof that a valid submission was made, and, accordingly, that, the contract being validly executed, the arbitrators were entitled to act on the submission. That

---

[2] [1900] A.C. 452.
[3] Ibid. 463.
[4] (1828) 7 B. & C. 785.
[5] L.R. 2 H.L. 239, 262.
[6] [1951] 2 K.B. 1.

1953

CHRISTOPHER BROWN LD.
v.
GENOSSENSCHAFT OESTERREICHISCHER.

Devlin J.

prima facie proof is sufficient for their purpose. They are not obliged to go into matters which might have been raised by the defence if that had been heard, and which might have rebutted the prima facie presumption to be drawn from the execution of the document that it was binding on the parties.

On these grounds, therefore, I think that the plaintiffs have proved their case and that they are entitled to judgment for which they ask. There will be judgment for the amount claimed and on the counterclaim, with costs.

Solicitors: *Franks, Charlesly & Leighton.*

S. C.

WARREN *v.* KEEN.

[Plaint J. 576.]

C. A.

1953
Oct. 8, 9.

Somervell, Denning and Romer L.JJ.

Landlord and Tenant — Repairs — Weekly tenancy—Duty of tenant—Keeping premises "wind and water tight"—Duty "to use premises "in a tenantlike manner"—Permissive waste—Tenant from year to year.

A weekly tenant is not under a general covenant to put and keep the premises in repair. His only duty is to use the premises in a husbandlike or tenantlike manner. If the house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by him, he is not liable to repair it.

Per Somervell L.J.: Whether there is an additional obligation on a tenant from year to year to keep the buildings wind and water tight, as stated by Swinfen Eady L.J. in *Wedd* v. *Porter* [1916] 2 K.B. 91, 100, remains at any rate in a state of some doubt.

Per Denning L.J.: It was suggested in argument that an action lies against a weekly tenant for permissive waste. I do not think that that is so.

APPEAL from Judge Tudor Rees, sitting at Brentford County Court.

Premises which were subject to the control of the Rent Restriction Acts had been let by the plaintiff landlord to the tenant on a weekly tenancy. Various repairs had been carried out at times by the landlord. When she was served by the Heston and Isleworth local authority with a notice to remedy certain defects, which rendered the premises unfit for habitation by reason of their not being wind and water tight, she carried out the necessary repairs and in the present action claimed to recover from the tenant the cost of those repairs which amounted to £23 5s. By the particulars of claim the landlord contended that it was an implied term of the tenancy that the defendant would use the premises in a tenantlike manner, would keep them wind and water tight, and would make fair and tenantable repairs thereto. The tenant denied liability for repairs.

The county court judge, according to his written notes, held that there was an implied covenant that the tenant would keep the premises in a good and tenantable condition and do such repairs as were necessary to that end. He therefore gave judgment for the landlord.

The tenant appealed.

H. M. Croome for the tenant. Throughout the authorities, wherever the doctrine of waste has been applied, there is to be found no reference to weekly tenancies. There may be no obligation on the landlord to do repairs, but there is certainly no obligation on a weekly tenant to do them. If in this case the county court judge came to the right conclusion, it means that a weekly tenant is liable for fair wear and tear—for damage due to the elements and to the lapse of time.

It is conceded that a tenant is liable for voluntary waste by reason of para. (*b*) of Sch. I to the Rent Restriction Act of 1933, for it is ground for granting possession to the landlord. But all the cases in which the expression "wind and water tight" is used are cases of year to year tenancies. It is doubtful whether a tenant from year to year is responsible for "fair wear and tear," but it is submitted that such a responsibility is unenforceable against a weekly tenant. The duty of the weekly tenant is to use the premises in a tenantlike manner, the meaning of which is explained by Scrutton L.J. in *Marsden* v. *Edward Heyes Ld.*[1]
[*Wedd* v. *Porter*[2] and *Mint* v. *Good*[3] were also referred to.]

Roger Willis for the landlord. The authorities establish that it is the duty of a tenant from year to year to keep the premises wind and water tight. Whatever the cause of wind and water trouble, the tenant has a duty to deal with it. It is agreed that no case is to be found in the reports of an action against a weekly tenant for failure to repair or keep the premises wind and water tight, but the reason may be the short duration and insecurity of a weekly tenancy. That, however, no longer applies with the operation of the Rent Acts. In principle there appears to be no reason why the same obligation should not be implied in a monthly or even in a weekly tenancy as in a yearly tenancy. A weekly tenant is certainly liable for permissive waste. He must not knock the premises about, and if something goes wrong he must take steps to prevent the deterioration of the premises. It is not sought to support the wide form in which the judge set out the obligation which he found was implied on the tenant, but it is submitted that the authorities support the view that a yearly tenant is under a duty to use the premises in a tenantlike manner and to keep them "wind and water tight." What that means is a question for experts. *Wedd* v. *Porter*[4] and *Auworth* v. *Johnson*[5] are relied on by the landlord. [*Horsefall* v. *Mather*,[6] *Peach* v. *Lowe*[7] and *Leach* v. *Thomas*[8] were also referred to.]

---

[1] [1927] 2 K.B. 1, 7.

[2] [1916] 2 K.B. 91.

[3] [1951] 1 K.B. 517; [1950] 2 All E.R. 1159.

SOMERVELL L.J. This is an appeal from a decision of Judge Tudor Rees, who decided in favour of the plaintiff, who was the landlord. The issues are clearly set out in the particulars of claim. It is there alleged, first, that the premises were let to the tenant on a weekly tenancy, and that the tenant had become a statutory tenant, but nothing turns on that. Paragraph 2 says: "It was an implied term of the said tenancy that the "defendant would use the said premises in a tenantlike manner, "would keep the same wind and water tight and would make "fair and tenantable repairs thereto. The tenant in breach of "the said implied term, has failed to use the said premises in "a tenantlike manner, has not kept the same wind and water "tight and has not made fair and tenantlike repairs thereto." The particulars of disrepair are important: "(*a*) First floor front "room (Large). Walls—plaster damp—stained below window "opening. (*b*) First floor front room (Small). Walls—plaster "damp—stained and perished below window opening. (*c*) "External. Front wall—rendering cracked and broken in parts. "Front floor window opening—sills not weatherproof, joints and "paintwork decayed. (*d*) Leak in hot water boiler."

There is an alternative allegation of waste, and it is alleged, and there is no dispute about this, that by reason of those matters the landlord had a notice served upon her by the borough of Heston and Isleworth, requiring her to remedy the defects. She was bound to remedy the defects, and she did so. They

---

[4] [1916] 2 K.B. 91.

[5] (1832) 5 C. & P. 239.

[6] (1815) Holt N.P. 7.

[7] [1947] 1 All E.R. 441.

[8] (1835) 7 C. & P. 327.

C. A.
1953

WARREN
v.
KEEN.

Somervell L.J.

cost her £23 5s., and she claims that the tenant is liable to her in that sum. The defence, quite broadly, is a denial that the tenant is under a liability in respect of the matters to which I have referred. The learned judge, according to his written note, which he prepared for this court, held that: "There was an "implied covenant that the tenant would keep the premises in "a good and tenantable condition and do such repairs as were "necessary to this end." He then found that the tenant was in breach of that implied covenant and had allowed the premises to deteriorate, and he held the tenant liable.

Mr. Willis, before us, did not seek to support the wide form in which the learned judge set out the obligation which he found was implied on the tenant. It would in fact mean that a weekly tenant was under a general covenant to keep, and perhaps to put and keep, in repair. No authority was cited for such a proposition and in principle I am quite clear that no such implied obligation rests upon a weekly tenant. It was suggested that the words in the note were wider than those used at the hearing.

The case for the landlord before us was put as it appears in the particulars of claim. It was alleged that a tenant from year to year was under an obligation not only to use and cultivate the land or premises in a husbandlike or tenantlike manner but also to keep the buildings wind and water tight. That obligation will be found stated in the judgment of Swinfen Eady L.J. in *Wedd* v. *Porter*[1] and in various other cases and in textbooks. On the other hand, the researches of counsel have failed to discover any case which throws light on the scope of that obligation, in other words, any case where a tenant has been held liable for failure to keep wind and water tight where the damage would not be covered by the obligation not to commit voluntary waste or the obligation to use the premises and land in a tenantlike manner. So whether there is an additional obligation of a limited kind with regard to repairs in the case of a tenant from year to year remains at any rate in a state of some doubt.

In *Auworth* v. *Johnson*,[2] Lord Tenterden in an interlocutory observation said: "A tenant from year to year is to keep the "premises in a little order," and then he said that the tenant had done nothing. When he came to sum up to the jury he used the words, the meaning of which is obscure, "to keep the "house wind and water tight." The argument is first that that obligation to keep wind and water tight applies to a weekly tenant as well as a tenant from year to year, and then, assuming that it does, the next submission is that the matters set out in the particulars of claim come within the covenant to keep the buildings wind and water tight. I think that submission fails at both stages. If there is a minor, but so far indefinite, obligation on a tenant from year to year to do certain minor repairs necessary to keep premises wind and water tight—and I will assume without deciding it that there is some such limited obligation—then I see no ground in principle for applying that to a tenancy from week to week. It is quite true that under the Rent Restriction Acts many tenants from week to week are enabled to remain in premises year after year, and the landlord may find great difficulty in fulfilling the conditions which have to be fulfilled under those Acts if he is to get possession. But that does not to my mind affect the question of what are the implications of a weekly tenancy. It seems to me that it would be absurd to suggest that a weekly tenant was under an obligation to repair. It is difficult to think of repairs which would not in themselves cost more than the weekly rent in many cases and yet it is suggested that he is impliedly liable to expend that money although his right to the premises may be terminated in a week's time.

---

[1] [1916] 2 K.B. 91, 100.

[2] 5 C. & P. 239, 240.

In the second place, I am myself quite clear that the matters particularized in the particulars of claim would not fall within the words " wind and water tight ". It seems to me clear that the damage here was due to decay of the walls, and there is no suggestion that that was due to any other cause than fair wear and tear. There is no suggestion that the tenant started knocking the walls about or anything of that sort, but in the course of time they had become cracked and presumably required re-pointing, because water was seeping in through the cracks which had appeared. The same would appear to have applied to the wood of the window sills. That may have been due not only to age but also to the positive failure to have the external woodwork re-painted every three years, or whatever is the normal time. Those would be both matters which in my opinion could not on any construction come under this formula of keeping the building wind and water tight, having regard to the principles which are to be found in the cases with regard to the implied liability of a tenant from year to year. Therefore, for these reasons, I think this appeal succeeds and the claim made by the landlord fails.

DENNING L.J. Apart from express contract, a tenant owes no duty to the landlord to keep the premises in repair. The only duty of the tenant is to use the premises in a husbandlike, or what is the same thing, a tenantlike manner. That is how it was put by Sir Vicary Gibbs C.J. in *Horsefall* v. *Mather*[3] and by Scrutton L.J. and Atkin L.J. in *Marsden* v. *Edward Heyes Ld.*[4] But what does "to use the premises in a tenantlike "manner" mean? It can, I think, best be shown by some illustrations. The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must, of course, not damage the house, wilfully or negligently; and he must see that his family and guests do not damage it: and if they do, he must repair it. But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by him, then the tenant is not liable to repair it.

The landlord sought to put upon the tenant a higher obligation. She said that the duty of the tenant was to keep the premises wind and water tight and to make fair and tenantable repairs thereto. That seems to be based on Hill and Redman on Landlord and Tenant, 11th ed., p. 186. I do not think that is a correct statement of the obligation.

Take the first branch, "to keep the premises wind and water "tight." Lord Tenterden, in one or two cases at Nisi Prius, used that expression and it was followed by the Court of Appeal in *Wedd* v. *Porter*,[5] but it is very difficult to know what "wind "and water tight" means. I asked counsel whether there was any case to be found in the books where a tenant had been held liable for breach of that obligation. I wanted to see what sort of thing it had been held to cover. But there was no such case to be found. In the absence of it, I think that the expression "wind and water tight" is of doubtful value and should be avoided. It is better to keep to the simple obligation "to use "the premises in a tenantlike manner."

Take the second branch, "to make fair and tenantable "repairs." Lord Kenyon used the expression in *Ferguson* v.

---

[3] Holt N.P. 7.

[4] [1927] 2 K.B. 7, 8.

[5] [1916] 2 K.B. 100.

Anon.,[6] which is only reported by Espinasse,[7] who was notoriously defective. It is said that he only heard half of what went on and reported the other half. If you read the whole sentence used by Lord Kenyon, however, it is clear that he was only referring to cases where a tenant does damage himself, such as breaking the windows or the doors. Then, of course, he must repair them. The sentence, used by Lord Kenyon, was explained by Bankes L.J. in *Marsden* v. *Heyes* [8] by saying that if a tenant commits waste—that is, if he commits voluntary waste by doing damage himself—he must do such repairs to the premises as will enable them to exclude wind and water. So explained, it does not support the proposition stated in Redman.

It was suggested by Mr. Willis that an action lies against a weekly tenant for permissive waste. I do not think that that is so. It has been held not to lie against a tenant at will, see the *Countess of Shrewsbury's* case,[9] and in my opinion it does not lie against a weekly tenant. In my judgment, the only obligation on a weekly tenant is to use the premises in a tenant-like manner. That does not cover the dampness and other defects alleged in the particulars of claim. The appeal should be allowed accordingly.

ROMER L.J. I also agree and can express in a very few words why I think the judge came to a wrong conclusion in this case. He is reported (although inaccurately as we were told) to have said in his judgment with regard to the original contract of tenancy, which was a weekly tenancy: "There was an implied "covenant that the tenant would keep the premises in a good "and tenantable condition and do such repairs as were neces-"sary to this end." That language (had it been used) would be attributing to a weekly tenant a degree of liability in the matter of repairs which is higher than that imposed by the law on tenants from year to year, as has been shown by Swinfen Eady L.J. in *Wedd* v. *Porter*,[10] and by Bankes L.J. in *Marsden* v. *Edward Heyes Ld.*[11] and by other cases to which my brethren

---

[6] (1798) 2 Esp. 590.

[7] In *Small* v. *Nairne* (1849) 13 Q.B. p. 844 Lord Denman C.J. said: "I am tempted to remark for the "benefit of the profession that Espi-"nasse's reports, in days nearer their "own time, when their want of "accuracy was better known than it "is now, were never quoted without "doubt and hesitation; and a special "reason was often given as an apology "for citing that particular case. Now "they are often cited as if counsel "thought them of equal authority with "Lord Coke's reports."

[8] [1927] 2 K.B. 1.

[9] (1600) 5 Co.Rep. 13b.

[10] [1916] 2 K.B. 100.

[11] [1927] 2 K.B. 7, 8.

C. A.
1953

Warren
v.
Keen.

Romer L.J.

have referred. Accordingly, Mr. Willis is unable to support the degree of liability which the learned judge was reported to have laid down.

From the cases I have mentioned I gather that, whatever may be the precise extent of the liability of a tenant from year to year, he is not liable for deterioration due to fair wear and tear and, if so, a fortiori, a weekly tenant is not so liable. Mr. Willis then submitted (and he has authority to support him) that a yearly tenant is at all events liable to keep the demised premises wind and water tight, whatever that may mean, and that this obligation is also imposed on a weekly tenant. There is no authority supporting that proposition so far as weekly tenants are concerned and I, for my part, find difficulty in accepting it. But, at all events, it is only necessary for me to say in the present case that in my opinion the deterioration of which the landlord complains, and on which she is suing in these proceedings, is deterioration due to fair wear and tear or failure to paint, or both, and a weekly tenant is certainly not answerable for deterioration of that character. Therefore, the judge, in my opinion, was in error, because whatever the liability of a weekly tenant may be it does not extend to the damage which is complained of in this particular case which, as I have said, is due to ordinary deterioration by wear and tear. I accordingly agree that the appeal should be allowed.

Somervell L.J. The appeal will be allowed and judgment entered for the tenant with costs here and below.

Appeal allowed.

Solicitors: *Merton Jones, Lewsey & Jefferies; Pengelly & Co.*

A. W. G.

C. A.

1953
Oct. 13.

Somervell,
Denning and
Romer L.JJ.

TEMPLE *v.* LEWIS.

[Plaint J. 599.]

Landlord and Tenant—Rent restriction—Premium paid by third person—Recovery by tenant—Set-off against arrears of rent—Limitation—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 8, 14 (1)—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 8 (2)—*Increase of Rent and Mortgage Interest (Restrictions) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 26), *s.* 7 (6)—*Landlord and Tenant* (*Rent Control*) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2 (5).

Early in 1951 the plaintiff landlord let a rent-controlled flat to the defendant, whose son, a person in the employ of the plaintiff, paid to the plaintiff a premium of £200 and also had agreed to be responsible for the rent. In 1952 the defendant's son left the employment of the landlord in order to go into business on his own account, and he ceased to pay the rent of the flat. In June, 1953, the landlord brought the present action in the county court to recover possession of the flat on the ground of non-payment of rent, amounting to £162 18s. 9d., and the defendant counterclaimed to set off the premium against the arrears of rent. The county court judge found for the defendant:—

Held (affirming the decision of the judge for a somewhat different reason), that even if the premium was not paid by the defendant's son as the defendant's agent, under section 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and section 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, the premium was recoverable by the son, and the judge had offered to give leave for him to be joined as a counter-claimant in the action.

Held, further, that the period of limitation of two years for the recovery of rent or mortgage interest overpaid by a tenant or mortgagor, which was provided by section 8 (2) of the Rent Restriction Act of 1923, did not apply to the recovery of premiums under section 8 of the Act of 1920 and section 2 (5) of the Act of 1949, the limit to which was six years under the Limitation Act.

APPEAL from Judge Pugh, sitting at Bloomsbury County Court.

In 1951 the plaintiff Temple, a textile manufacturer, let a flat to the defendant Lewis, who was the father of an employee of the plaintiff who went by the name of Lytton. In consideration of the letting Lytton, as was found by the county court judge, paid to the plaintiff a premium of £200. Lytton also agreed to be responsible for the rent of the flat, his parents' means being restricted. In about the middle of 1952 Lytton left the employment of the plaintiff and commenced business on his own behalf, and from that time ceased to pay the rent of the flat. In those circumstances, in July, 1953, the plaintiff brought the present action against the tenant Lewis, claiming possession of the flat on the ground of non-payment of rent. By his defence and counterclaim the defendant claimed to set off against the arrears of rent, amounting to £162 18s. 9d., the premium of £200 paid by his son.

The county court judge found that there had been a premium paid, and that in paying it Lytton had acted as his father's agent, and that the defendant was therefore entitled to a set off under the Rent Restriction Acts.

The plaintiff appealed, contending that the premium, having been paid by a third party, and not as the tenant's agent, was not recoverable by the defendant tenant; and, moreover, that recovery was barred by the limitation of two years imposed by section 8 (2) of the Rent Restriction Act of 1923 and section 7 (6) of the Act of 1938.

Robert Fortune for the plaintiff. It is said by Lytton that he paid the £200 to the plaintiff as a premium. It is submitted that to be recoverable under section 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, a premium must have been paid by the tenant. Here, not only was the tenant not called as a witness, but no money was paid by the tenant. To succeed, the tenant must prove that the money was paid by Lytton as agent for the tenant; otherwise the result would be that a person can recover money which he has not himself paid. There was no evidence on which the county court judge could find that Lytton paid the premium as agent for his father.

Further, by section 8 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, and section 7 (6) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, a premium can only be recovered if proceedings are taken within two years of the payment.

Harry Lester for the defendant. Section 8 (2) of the Act of 1923 refers only to payments recoverable under section 14 (1) of the Act of 1920 and not to section 8 of the 1920 Act, which makes premiums recoverable.

He was not called upon for further argument.

SOMERVELL L.J. This is an appeal from a decision of Judge Pugh. It is unfortunate that, although his judgment was short, no note taken by solicitors or counsel has been submitted to the judge, as is usual, so that he could refresh his memory and, for the assistance of this court, give a summary of the reasons for his decision. However, both sides agree that the points of law which the plaintiff seeks to take here were taken below, and we have had read to us a rough note which Mr. Fortune had himself taken of what the judge said. The particulars of claim set up a claim for possession based on arrears of rent. The house was admittedly within the limits of the Rent Acts. The arrears of rent were £162 18s. 9d. The defence was that before the granting of the lease the landlord had exacted, and the defendant had paid, £200 by way of premium. The defendant claimed to set off that sum, which he was alleging under the relevant Act was recoverable, as against the rent. The reply was a denial that any such premium was paid.

The judge found that a sum of £200 was paid to the plaintiff, but he also found the following circumstances, as to which there is in substance no dispute, though we have not heard Mr. Lester. The plaintiff was negotiating, and successfully negotiating, at some time in 1951, for a further lease of a flat which he had previously occupied, or possibly it had been occupied by his wife while they were living apart. He had in his employment at that time a man who was known as Lytton, though he was the son of the defendant Lewis. He had presumably changed his name. Lytton asked whether his father and mother, who were getting on in life, could live in this flat. That is how the lease came to be granted by the plaintiff to the defendant. Lytton agreed to be responsible for, and for a period he in fact paid, the rent. In 1952 the plaintiff and Lytton parted company, and from that time onwards no rent was paid. These proceedings were started, and there was the allegation of the premium. The judge found that there had been a premium paid and that the defendant was therefore entitled to a set off. Against that finding of fact, that £200 was paid by way of premium, Mr. Fortune agrees that he cannot effectively appeal. Lytton said in his evidence, according to the note, that his parents were impecunious.

The first point taken for the plaintiff was that the premium was paid by Lytton and not by the defendant tenant, and was therefore irrecoverable. That may raise the question whether, if a premium is paid by a third party as principal, it can be recovered under the Act. The judge found against the plaintiff on that point, because he held that Lytton in making these payments was acting as agent for his parents. I take it that that means that as between the parties concerned Lytton was saying to the plaintiff: "I am asking that you should grant a "lease to my parents. They are to be the principals; they are "the people interested, but I am in fact making payment for "them so you can apply to me for the rent and you will get my "cheque. You can apply to me for the premium which has "been arranged and you will get my cheque, but I am acting "on behalf of my parents." I can see no reason in law why the

Somervell L.J.

judge should not have so construed the position. In other words, the defendant was the proper plaintiff on the counterclaim in respect of the premium. But we need not really be troubled about that (and the exact facts which the judge found and on which he based his conclusions are not clearly before us) because, in my view, even if one treats the premium paid by Lytton as a payment by a principal, he could recover it. The judge said in his judgment that if there was in law any necessity for Lytton to be added, he would give leave for him to be added.

Mr. Fortune submits that both the earlier and the present legislation should be construed as only conferring the right to recover a premium on a tenant, and only, therefore, in circumstances where the tenant has, as principal, himself paid the premium. I do not accept that contention. It seems to me that the original section, which was section 8 of the Act of 1920, and the present section 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949, are plainly so worded as to cover the case, if it arose, where a premium was exacted by a landlord and paid by a third party.

Section 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, reads: "A person shall not, as a condi-"tion of the grant, renewal, or continuance of a tenancy or sub-"tenancy of any dwelling-house to which this Act applies, require "the payment of any fine, premium, or other like sum, or the "giving of any pecuniary consideration, in addition to the rent, "and, where any such payment or consideration has been made "or given in respect of any such dwelling-house under an agree-"ment made after the 25th day of March, 1920, the amount of "value thereof shall be recoverable by the person by whom it "was made or given." It does not, in other words, say "by "the tenant." Similar words are to be found at the end of what is now the relevant provision, namely, section 2 (5) of the Landlord and Tenant (Rent Control) Act, 1949. That again finishes up with the words "shall be recoverable by the person "by whom it was paid." If, therefore, any criticism in law could be thrown on the judge's findings as to agency, the matter could, and would have been, set right by the joining of Lytton, who could have succeeded in proceedings for the recovery of the premium. That point, therefore, in my opinion, fails.

The other point is this: it is said that under the statute there is a period of limitation of two years for the recovery of premiums, and that in the present case the two years had elapsed, because the premium which it is sought to set off was paid on May 3, 1951, and the counterclaim was dated June 17, 1953. That is a view which is supported by a note in the Law Notes book, which is a very useful compilation very often referred to in these cases. But in Mr. Megarry's textbook the view is taken that there is no special period of limitation applicable to the recovery of premiums.

The relevant sections are, first, section 8 of the Act of 1920, of which I have already read all that I need. That gives the right to recover the premium. Section 14 of the Act of 1920, as originally drafted, provides: " Where any sum has, . . . been paid " on account of any rent or mortgage interest, being a sum " which is by virtue of this Act, or any Act repealed by this " Act, irrecoverable by the landlord or mortgagee, the sums so " paid shall be recoverable from the landlord or mortgagee who " received the payment or his legal personal representative by the " tenant or mortgagor by whom it was paid, and any such sum, " and any other sum which under this Act is recoverable by a " tenant from a landlord or payable or repayable by a landlord " to a tenant, may, without prejudice to any other method of " recovery, be deducted by the tenant or mortgagor from any " rent or interest payable by him to the landlord or mortgagee." Pausing there, the effect of that is that the right to recover rent over-paid, or mortgage interest, is conferred by this section; but in respect of a premium, the right to recovery of which arises under section 8, this section confers a right to deduct from the rent without prejudice to other methods of recovery. There were at that time no special limitations on the right to recover with which these sections dealt, though no doubt the ordinary general provisions of the Limitation Acts were applicable.

Section 8 (2) of the Act of 1923 provides: " Any sum paid by " a tenant or mortgagor which, under subsection (1) of section 14 " of the principal Act is recoverable by the tenant or mortgagor " shall be recoverable at any time within two years from the " date of payment but not afterwards, or in the case of a payment made before the passing of this Act, at any time within " six months from the passing of this Act but not afterwards." Those six months were extended by section 7 (6) of the Act of 1938 to two years, again with certain exceptions which do not matter. The question is whether those words are applicable to premiums recoverable under section 8. I think that quite plainly they are not. The premium was not in my opinion recoverable under section 14 (1). It was recoverable under section 8, and all that section 14 did was to give an additional right to deduct from the rent, on the assumption, presumably, that it could not have been set off under ordinary principles of law.

In my opinion, therefore, there never has been in this code a period of limitation as applicable to a premium. It may be that even if there had been such a limitation under these earlier Acts, the 1949 legislation would not be construed as incorporating them. Once, however, one comes to the conclusion that the sections to which I have referred do not impose a two years' limitation, the basis of the argument disappears altogether. For these reasons, I think that the two points taken on the appeal fail and that it should be dismissed.

DENNING L.J. It is plain that when a person other than the tenant pays a premium, the time limit for recovery is not two years but six years. So, also, when a person other than the landlord exacts a premium, the time limit for recovery is not two years but six years. No sensible distinction can be drawn between those cases and the case of a premium paid by a tenant to a landlord. There, also, the time limit is not two years but six years. On an analysis of the sections such as my Lord has made it is plain that the time limit for recovery of a premium is six years. The premium is not recovered under section 14 of the Act of 1920, but was originally recovered under section 8 of that Act, and now under section 2 of the Act of 1949. I agree, therefore, that the appeal should be dismissed.

ROMER L.J. I also agree. On the question of limiting the period for the recovery of premiums it seems to me that the plaintiff, in order to succeed, would have to delete from section 8 (2) of the Act of 1923 the express reference which is found there to subsection (1) of section 14 of the Act of 1920 and read it as though it had said "any sum paid by a tenant or mortgagor "which under the principal Act is recoverable," and so on. That is not what is there. A special period of limitation is imposed by the legislature with regard to certain claims. Those claims are limited to sums which are recoverable under subsection (1) of section 14 of the principal Act, and amongst those sums premiums are not included. Accordingly, I agree with the view which Mr. Megarry expresses on this point on p. 383 of his book on the Rent Acts (7th ed.).

Appeal dismissed.

Solicitors: *Renshaws; Beach & Beach.*

A. W. G.

MARLES *v.* PHILIP TRANT & SONS LD.
MACKINNON, THIRD PARTY.

C. A.

1953
Jan. 30;
Feb. 2, 3, 16.

Singleton, Denning and Hodson L.JJ.

Contract—Illegality—Damages—Sale of wheat seeds—Breach of condition regarding description—Same wheat sold by merchants to plaintiff on same description—Failure by merchants to deliver to plaintiff statement containing particulars prescribed by section 1 *of the Seeds Act,* 1920*—Illegality in performance of contract—Plaintiff awarded damages and costs against seed merchants—Recovery of their loss by merchants from their vendor as third party.*

Seeds—Sale—Statement of particulars—Variety—Effect—Seeds Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 54), *ss.* 1, 2 (1), 6 (1).

Seed merchants bought from a farmer, the third party, wheat under the description of spring wheat known as Fylgia, and the merchants sold to a farmer part of this wheat under the same description. The wheat was not spring wheat and was known as Vilmorin. The farmer sued the merchants claiming damages for breach of contract and warranty, recovering judgment for £418 5s. 10d. and costs. The merchants had added the person who supplied them with the wheat as a third party, claiming from him an indemnity for the loss of what they had had to pay to the farmer and also damages. The third party took the point that since the merchants had not, in conformity with section 1 of the Seeds Act, 1920, delivered to the plaintiff a statement in writing containing the prescribed particulars with respect to the seeds' variety, purity and germination, the contract of the merchants with the plaintiff was illegal and, therefore, the merchants could not recover their loss on it from the third party. The trial judge who, otherwise, would have given judgment against the third party, on the ground that it was their breach of warranty or of contract which had led to the damage, upheld the contention of the third party and gave judgment for him against the merchants. The merchants appealed and, before the Court of Appeal, the third party admitted that the merchants were entitled to recover nominal damages against the third party, but not an indemnity for their loss on their contract with the plaintiff:—

Held, that the contract between the seed merchants and the plaintiff was not an illegal contract and that the merchants could make out their cause of action against the third party without any recourse to their illegality in not providing the particulars prescribed; but that (*per* Singleton and Denning L.JJ., Hodson L.J. dissenting), since the statutory offence of the merchants was one of mere inadvertence and the damage did not result from that omission, the merchants were entitled to recover from their supplier the particular loss arising from their sub-contract with the plaintiff. Nor could the supplier rely on section 6 of the Seeds Act, 1920. The provision therein that particulars under section 1 should be deemed to be true did not apply (*per* Singleton L.J.) to particulars of variety, or (*per* Denning L.J.) to cases where a buyer did not need to rely on the particulars for his cause of action.

Per Hodson L.J., dissenting: In view of *Anderson Ld.* v. *Daniel* [1924] 1 K.B. 138, it was impossible to allow the defendants, who could not rely on the illegality of performance of their contract for one purpose—they could not have recovered the price of the seed they sold to the plaintiff—to rely on it for another. The defendants were entitled only to nominal damages against the third party. Moreover, the third party was entitled to rely on section 6 of the Seeds Act, 1920.

Anderson Ld. v. *Daniel* [1924] 1 K.B. 138; 40 T.L.R. 61 and *B. & B. Viennese Fashions* v. *Losane* [1952] 1 T.L.R. 750; [1952] 1 All E.R. 909 distinguished.

Tinline v. *White Cross Insurance Association Ld.* [1921] 3 K.B. 327; 37 T.L.R. 733 and *James* v. *British and General Insurance Co. Ld.* [1927] 2 K.B. 311; 43 T.L.R. 354 considered.

Decision of Lynskey J. reversed by a majority.

APPEAL from a judgment by Lynskey J., delivered at Winchester Assizes.

Early in 1950 the defendants, Philip Trant & Sons Ld., seed merchants, bought from Alexander Ewen Mackinnon, a farmer, their supplier, 10 tons of wheat by description as spring wheat, known as Fylgia. The seed merchants sold it under the same description in smaller parcels to several farmers, who sowed it as spring wheat. It was in fact known as Vilmorin, a winter wheat. The crops failed. One of the farmers, Marles, the plaintiff, brought an action against the seed merchants claiming damages for breach of contract and for breach of warranty, and recovered judgment for £418 5s. 10. and costs, less a sum owed by him to the defendants. The seed merchants brought in Mackinnon, who had supplied the seed to them, as a third party, on the ground that he had represented to them that the wheat was a spring wheat and was Fylgia, and that he knew that the seed merchants were buying the wheat for resale to farmers for spring sowing and were relying on his representations and on his skill and judgment as a farmer whose business it was to grow and sell wheat. They claimed to be indemnified against the claim of the plaintiff in the action and they also asked for damages.

Lynskey J. found that the third party did sell this 10 tons of seed to the defendants as Fylgia seed so described, and that there was an implied condition that the defendants were relying on his skill and knowledge and that he knew that it was for resale. But his Lordship held that the seed merchants were not entitled to the relief they sought against their supplier, the third party, since they had not, in conformity with section 1 (1) of the Seeds Act, 1920,[1] delivered to Marles, the plaintiff, a statement in writing containing the prescribed particulars with respect to the seeds' variety, purity and germination. No complaint on that head was made by Marles, but it was submitted on behalf of the third party that the failure to deliver the statement made the contract between the seed merchants and Marles an illegal contract, from which it followed, it was said, that no part of the damages for breach of warranty awarded to Marles against the seed merchants could be recovered from their supplier, the third party, though it was proved to the satisfaction of the judge that it was the third party's breach of warranty which led to the damage.

The seed merchants had had the wheat tested at an official testing station, and the results of the test showed that it satisfied requirements as to purity and germination. But the seed

---

[1] Seeds Act, 1920, s. 1: "(1) "Every person who sells any seeds "to which this Act applies or any "seed potatoes, shall, on or before the "sale, or if the goods are not delivered "at the time of sale on or before "delivery thereof, deliver to the pur- "chaser a statement in writing con- "taining the prescribed particulars "with respect, in the case of seeds, to "their variety, purity and germina- "tion, and in the case of seed potatoes, "to their class, variety, size and "dressing, and, in either case, to any "other prescribed matters. . . . "(3) The statement required to be "delivered under this section to a "purchaser shall be contained in a "sale note or invoice or be attached "to, inserted in, or written on, the "package containing the seeds, or "seed potatoes, as the case may "be. . . . (5) The particulars to be "contained in a statement to be "delivered under this section to a "purchaser of seeds shall, so far as "they are particulars relating to the "purity and germination of the seeds, "be particulars ascertained on a test "of those seeds made in accordance "with the provisions of this Act."

S. 2 (1): "A test of seeds for the "purpose of the preceding section "shall, in the case of seeds other than "garden seeds, be made either at one "of the official seed testing stations "established under this Act or at "some testing station licensed by the "Minister, and, in the case of garden "seeds, be made either as aforesaid "or in any other sufficient manner."

S. 6 (1): "For the purpose of any "legal proceedings on a contract for "the sale of seeds, being a sale to "which this Act applies, the particu- "lars contained in the statement "delivered in pursuance of this Act "on the sale should be deemed to be "true unless it is made to appear on "a test made subject to the provi- "sions of this section that the par- "ticulars were untrue and, in the "case of particulars relating to purity "or germination, that the actual per- "centage of purity or germination "differs from the percentage appear- "ing in the particulars by more than "the prescribed limit of variation."

S. 8 provides that if any person fails to comply with, or acts in contravention of, any provision of the Act, or makes a statement required to be given under the Act which is false in any material particular, he shall, without prejudice to any civil liability, be liable on summary conviction to a fine.

C. A.
1953

Marles
v.
Philip
Trant &
Sons Ld.
Mackinnon,
Third
Party.

merchants did not deliver the particulars required by section 1 (1) of the Act and this was held by Lynskey J. to be a fatal bar to the seed merchants' recovering an indemnity from the third party for whom his Lordship gave judgment.

The seed merchants appealed.

* *D. A. Scott Cairns Q.C.* and *F. S. Laskey* for the seed merchants.

B. MacKenna Q.C. and *Malcolm McGougan* for the third party.

Cur. adv. vult.

February 16. Singleton L.J., having stated the facts, continued: The argument advanced on behalf of the third party gains support from the decision of this court in *Anderson Ld.* v. *Daniel*,[1] in which the plaintiffs had sold something which fell within the provisions of the Fertilisers and Feeding Stuffs Act, 1906, so that an invoice in prescribed terms had to be delivered to the purchaser. No such invoice was given. The vendors sued for the price, and it was held that they were not entitled to recover. Atkin L.J. regarded the contract as " unenforceable by the offending party " where the illegality arises from the fact that the mode of " performance adopted by the party performing it is in violation of " some statute, even though the contract as agreed upon between " the parties was capable of being performed in a perfectly legal " manner "[2]; and that was sufficient for the decision of the court. Both Bankes L.J. and Scrutton L.J. went further and spoke of the contract as illegal. Bankes L.J. added[3]: " So here " I say that a vendor of fertilisers must comply with the pro- " visions as to invoice in order to take advantage of the contract " of sale. From that point of view it is unnecessary to consider " whether the contract was illegal ab initio." While I follow the reasoning that the delivery was a bad, or an incomplete, delivery, I cannot see that the contract became an illegal contract, nor was that point necessary for the case under review. Clearly the purchaser could have sued on the contract.

Reliance was placed also on parts of the judgment of Sir Vicary Gibbs C.J. in *Simpson* v. *Bloss*,[4] in which it was said that

---

* Owing to the untimely death of the reporter, it is not possible to publish the argument in this case.

[1] [1924] 1 K.B. 138; 40 T.L.R. 61.

[2] [1924] 1 K.B. 138, 149.

[3] Ibid. 145.

[4] (1816) 7 Taunt. 246, 250.

C. A.

1953

MARLES
v.
PHILIP
TRANT &
SONS LD.
MACKINNON,
THIRD
PARTY.

Singleton L.J.

the plaintiff's claim was so mixed with an illegal transaction in which he and the defendant and Brograve were jointly engaged that it could not be established without going into proof of that transaction, and therefore could not be enforced in a court of law, and in which case reference was made to the reason for the decision in *Ex parte Bell*[5] " because the claim was bottomed in " an illegal contract."

The decision in *Anderson Ld.* v. *Daniel*[6] was followed in this court in *B. & B. Viennese Fashions* v. *Losane*,[7] where Jenkins L.J. said[8]: " It is plain from *Anderson Ld.* v. *Daniel*[9] " that illegality in the performance of a contract may avoid " it, although the contract was not illegal ab initio. That " being so, one has to consider whether the mode in which the " contract was performed, or purported to be performed, in this " case sufficed to turn it into an illegal contract. I find myself " constrained to hold that this was the result." The principle underlying those decisions is really the same as that stated by Lord Ellenborough C.J. in *Langton* v. *Hughes*[10]: " What is " done in contravention of the provisions of an Act of Parliament, " cannot be made the subject-matter of an action."

As Lynskey J. said in the present case: " The whole of that " claim is based on resale of the wheat. Before the defendants can " substantiate their right to claim against the third party they have " to set up this contract with the plaintiff in order to show that the " damages which they have to pay the plaintiff flowed from the " breach of contract, and that there was a breach by the third " party. So, they have to set up this contract which they have " performed in an unlawful manner, and therefore made an " unlawful contract, at any rate, so far as they are concerned. " That seems to be the result of the two cases to which I have " referred. That being so, it seems to me that they cannot set " up a contract, being an illegal contract unlawfully performed " by them, in support of their claim against the third party."

The defendants appeal to this court against the judgment of Lynskey J. in favour of the third party, and the question for consideration is whether the passage which I have just read is right. Before us it was admitted that the defendants were entitled to nominal damages, for which they asked at the trial in the event of their not being held entitled to an indemnity.

---

[5] (1813) 1 M. & S. 751.

[6] [1924] 1 K.B. 138.

[7] [1952] 1 T.L.R. 750; [1952] 1 All E.R. 909.

[8] [1952] 1 T.L.R. 750, 755.

[9] [1924] 1 K.B. 138.

[10] (1813) 1 M. & S. 593, 596.

There was no such admission at the trial, nor were the defendants given nominal damages. Mr. Scott Cairns submitted that, if by reason of the point raised the defendants were not entitled to an indemnity or to damages—in the nature of special damages—arising from the sub-sale, they were still entitled to general damages, that is, the damages which flowed naturally from the breach, and at least to the price of the seed wheat which turned out to be useless to them. No such claim was put forward at the trial. I do not think that it can properly be raised now. And I draw attention to that which was said by Devlin J. in *Biggin & Co. Ld.* v. *Permanite Ld.*[11]: "If, however, a subsale is within "the contemplation of the parties, I think that the damages "must be assessed by reference to it, whether the plaintiff likes "it or not. Suppose that the only fault in the compound was its "incompatibility with bitumen felt, the chance that it might "produce bad results would certainly reduce its market value "before use. But if it is the plaintiff's liability to the ultimate "user that is contemplated as the measure of damage and if "in fact it is used without injurious results so that no such "liability arises, the plaintiff could not claim the difference in "market value, and say that the subsale must be disregarded."

It seems to me that the defendants do not need to refer to their contract with the plaintiff to show a right of action against the third party. Their claim was for damages for breach of contract, or for breach of warranty, and on the facts found by the trial judge the claim was established. Indeed, as I have said, it was admitted by Mr. McKenna that the defendants were entitled to nominal damages. The question whether they are entitled to more presents greater difficulty. The judge found that the damages which he awarded to the plaintiff were damages which arose from the breach of warranty of the defendants, and it is clear that he would have found that the defendants were entitled to succeed against the third party but for the point raised under the Seeds Act, 1920. Thus the claim of the defendants can be put in this way: "We have been ordered by the "court to pay damages to the plaintiff, and the cause of that "was your breach of contract or breach of warranty. It is "unnecessary to consider how we performed our contract with "the plaintiff; that has nothing to do with the breach of "warranty between you and us. The court has ordered us to "pay damages, and the responsibility falls upon you." If the case can properly be regarded in this way the defendants do not need the contract between them and the plaintiff either to establish their cause of action, or to justify their claim to an indemnity, or to the damages they have been ordered to pay to the plaintiff. Nor are they taking advantage of the contract of sale with the plaintiff, if I may repeat an expression of Bankes L.J., though it is clear that he had not this particular question in mind; he was considering a claim for the price of goods made by the vendor. Nor are they making their contract with the plaintiff the subject-matter of their action. They have been ordered to pay damages upon it.

---

[11] [1951] 1 K.B. 422, 436; 66 T.L.R. (Pt. 2) 944; [1950] 2 All E.R. 859, 869.

Further, I do not think that the contract between the plaintiff and the defendants ought to be regarded as an illegal contract, though the mode of performance by the defendants was not in accord with statutory requirements. They were guilty of an error of omission, which meant the commission of an offence under section 8 of the Seeds Act, 1920, and which might have resulted in their being unable to recover the price from the plaintiff. The plaintiff did not raise any such question, nor has the loss incurred anything to do with that omission. Unless either (1) the contract was an illegal contract, or (2) the damage resulted from the omission, it does not seem to me that the third party can rely by way of answer to this claim upon the fact that the defendants inadvertently omitted to supply to the plaintiff the statement in writing required by section 1 (1) of the Seeds Act, 1920. The decision of Lynskey J. that the failure to supply the particulars to the plaintiff enables the third party to avoid his obligations to the defendants goes further than any decision that has been cited, and I do not think that it should be upheld. The third party had nothing to do with the contract between the plaintiff and the defendants.

A further point raised on behalf of the third party was that if the defendants had delivered a statement in writing containing the particulars required by section 1 (1) of the Act, the plaintiff could have no claim, having regard to the terms of section 6 (1).

[His Lordship read the subsection:] It was said that, if the statement which ought to have been delivered had contained the description "Fylgia," that was to be deemed to be true in the absence of a test as to description. I find difficulty in saying what is the true meaning of section 6, and not one of counsel who addressed us was able to give any real help upon this. The Act was clearly designed to help the farmer against the seed merchant who supplied indifferent seed, but if the argument advanced on behalf of the third party were accepted, it would defeat a claim by the farmer every time if he relied upon the certificate as to variety and the seed was not in fact of the variety stated. It is the duty of the seed merchant to supply the statement, and it was not the intention of Parliament that the farmer should have another test made. Moreover, no one told us of any test for variety other than growth. Some, but not all, experts may be able to tell the variety of seed wheat, but what test there is other than sowing the seed and waiting for it to grow from the earth I do not know. I do not think that any can be contemplated at the testing station. It appears that the testing station received on February 20, 1950, a sample described as "Fylgia" and tested it for purity and germination, and the test was satisfactory. Those considerations lead me to think that variety ought not to be considered as within the word "particulars" in section 6, difficult though it is to reconcile the wording with this view. Lynskey J. left this point undecided; for myself I cannot see that section 6 can be treated as a bar to the defendants' claim against the third party; to come to any other conclusion would be to defeat the very purpose for which the Act was passed.

I would allow the appeal and grant to the defendants the relief which they seek against the third party.

DENNING L.J. The first question which arises in this case is: what is the legal effect of the omission to supply the particulars prescribed under the Seeds Act? The trial judge has held that it turned the contract with the farmer, so far as the seed merchant was concerned, into an illegal contract. The judge so held on the authority of *Anderson Ld.* v. *Daniel*[12] and *B. & B. Viennese Fashions* v. *Losane*,[13] and there are indeed some observations in those cases which warrant him taking that view. But I do not think that they are correct. There can be no doubt that the contract between the seed merchants and the farmer was not unlawful when it was made. If the farmer had repudiated it before the time for delivery arrived, the seed merchants could certainly have sued him for damages. Nor was the contract rendered unlawful simply because the seed was delivered without the prescribed particulars. If it were unlawful, the farmer himself could not have sued upon it as he has done. The truth is that it was not the contract itself which was unlawful, but only the performance of it. The seed merchants performed it in an illegal way in that they omitted to furnish the prescribed particulars. That renders the contract unenforceable by them, but it does not render the contract illegal. Atkin L.J. expressed the position with his usual accuracy in *Anderson Ld.* v. *Daniel*[12] when he said simply that the contract was unenforceable. I do not think that the law has ever countenanced the idea that a transaction, lawful when done, can be rendered unlawful by the doctrine of relation back: see *Elliott* v. *Boynton.*[14] A transaction which is unlawful, when done, can be rendered lawful by relation back (see *Howell* v. *Falmouth Boat Construction Co. Ld.*[15]) but not vice versa.

---

[12] [1924] 1 K.B. 138.

[13] [1952] 1 T.L.R. 750.

Once rid of the notion that the contract with the farmer was itself illegal, the question becomes: what is the effect of the admitted illegality in performance? It certainly prevents the seed merchants from suing the farmer for the price, but does it prevent them suing their supplier for damages? I think not. There was nothing unlawful in the contract between the seed merchants and their supplier, neither in the formation of it, nor in the performance of it. The seed merchants must therefore be entitled to damages for the breach of it. So far so good, but the difficulty comes when they seek to prove their damages. They want to be indemnified for the damages which they have been ordered to pay to the farmer. To prove those damages, they have to prove the contract with the farmer, and the circumstances under which the damages were awarded. It is said that once they begin to rely on their deliveries to the farmer, they seek aid from their own illegality; and that that is a thing which they are not allowed to do. The maxim is invoked: Ex turpi causa non oritur actio. That maxim must not, however, be carried too far. Lord Wright gave a warning about it 15 years ago in *Beresford* v. *Royal Insurance Co. Ld.*[16] when he said: "The maxim itself, notwith-"standing the dignity of a learned language, is, like most "maxims, lacking in precise definition. In these days there are "many statutory offences which are the subject of the criminal "law, and in that sense are crimes, but which would, it seems, "afford no moral justification for a court to apply the maxim. "There are likewise some crimes of inadvertence which, it is "true, involve mens rea in the legal sense but are not deliberate

---

[12] [1924] 1 K.B. 138.

[14] [1924] 1 Ch. 236; 40 T.L.R. 180.

[15] [1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278.

[16] [1937] 2 K.B. 197, 219; 53 T.L.R. 583; [1937] 2 All E.R. 243.

C. A.
1953

Marles
v.
Philip
Trant &
Sons Ld.
Mackinnon,
Third
Party.

Denning L.J.

"or, as people would say, intentional." Those observations apply with especial force in this case. The omission by the seed merchants to deliver the prescribed particulars was an act of inadvertence. It was not a deliberate breach of the law. I venture to assert that there is no moral justification for the court to apply the maxim in this case. But is there any legal justification? A distinction must be drawn, I think, between an illegality which destroys the cause of action and an illegality which affects only the damages recoverable.

So far as the cause of action itself is concerned, the principle is well settled that, if the plaintiff requires any aid from an illegal transaction to establish his cause of action, then he shall not have any aid from the court. That appears in all the books from *Simpson* v. *Bloss* [17] down to *Berg* v. *Sadler and Moore* [18] and *J. Dennis & Co. Ld.* v. *Munn.*[19] In my opinion, those cases have no application to this case, because the seed merchants here can make out their cause of action perfectly well without any recourse to the illegality at all. All they need to do is to prove the contract by which the supplier agreed to supply Fylgia seed, and then show that he in fact supplied Vilmorin. That is sufficient to entitle them, by way of damages, to the estimated loss directly and naturally resulting, in the ordinary course of events, from that breach of contract: see *Cory* v. *Thames Ironworks, etc., Co.*[20] and section 53 (2) of the Sale of Goods Act, 1893. There was no need for them to claim the particular loss arising from the sub-contract, and so long as they refrained from claiming that loss, there could be no possible objection to the claim: see *Gordon* v. *Chief Commissioner of Metropolitan Police.*[21]

The difficulty only arises because the seed merchants claim the special loss resulting from the sub-contract. The supplier says, in effect, to the seed merchants: "I have discovered that "you have been guilty of an illegality. You did not deliver the "prescribed particulars to the farmers who bought from you. "Therefore you cannot recover your loss." It is to be noticed that the omission to deliver the particulars does not make any practical difference in this case. Even if the seed merchants had delivered the prescribed particulars, the position would have been the same. The seed would have been described as Fylgia, and the plaintiff would have recovered his damages just the same.

---

[17] 7 Taunt. 246.

[18] [1937] 2 K.B. 158.

[19] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.

[20] (1868) L.R. 3 Q.B. 181.

[21] [1910] 2 K.B. 1080; 26 T.L.R. 645.

Nevertheless, the supplier says that he is entitled in law to be relieved of liability.

So far as this question of damages is concerned, the civil courts act on the principle that they will not lend their aid to a man so as to enable him to get a benefit from his own crime; nor will they help him to get reparation for the consequences of his own culpable criminal act. Thus, when a man committed suicide in order that the insurance moneys payable on his death might be obtained, his representatives were not allowed to recover the amount: *Beresford* v. *Royal Insurance Co. Ld.*[22] When a solicitor sought to be indemnified by his insurers against the consequences of his own champerty, his action failed: *Haseldine* v. *Hosken.*[23] When a wholesale wine merchant bought from a manufacturer liquor which he should have known was contaminated, and resold it, without lawful excuse, to his customers, he was not allowed to recover from the manufacturers the damages which he had to pay to his customers: *Askey* v. *Golden Wine Co. Ld.*[24] In those cases the plaintiff was undoubtedly seeking to get reparation for the consequences of his own culpable crime.

But there are cases nowadays where a man can be guilty of a crime without any moral culpability at all. Thus, a man who is induced by fraud to do a criminal act will have a cause of action against the deceiver, if he himself had no knowledge of the circumstances which rendered it criminal: *Burrows* v. *Rhodes.*[25] And a provision merchant who relies on a warranty by his supplier, but subsequently is convicted for selling bad food, will be able to recover any damage he suffers by reason of reselling it to his customers (*Crage* v. *Fry*,[26] *Cointat* v. *Myham & Son*,[27] and *Weld-Blundell* v. *Stephens* [28]) provided, of course, that the damages claimed are not too remote: *Simon* v. *Pawsons & Leafs Ld.*[29] It has been held that a motorist who had to pay damages for negligence could recover an indemnity from his insurers even though the negligence was so gross as to amount to manslaughter: *Tinline* v. *White Cross Insurance Association Ld.*[30]

---

[22] [1937] 2 K.B. 197; [1938] A.C. 586; 54 T.L.R. 789; [1938] 2 All E.R. 602.

[23] [1933] 1 K.B. 822; 49 T.L.R. 254.

[24] 64 T.L.R. 379; [1948] 2 All E.R. 35.

[25] [1899] 1 Q.B. 816, 831; 15 T.L.R. 286.

[26] (1903) 67 J.P. 240.

[27] [1913] 2 K.B. 220; 29 T.L.R. 387.

[28] [1919] 1 K.B. 520, 539; 35 T.L.R. 245.

[29] 38 Com.Cas. 151, 157–8.

[30] [1921] 3 K.B. 327; 37 T.L.R. 733.

and *James* v. *British and General Insurance Co. Ld.*[31] I think that those cases were rightly decided. The right to indemnity for negligence should not depend on the chance whether a man is prosecuted, or the further chance whether he is convicted. Those cases were stronger than the present case. If public policy did not prevent recovery in those cases, it should not prevent recovery here.

One further point. It was said that the seed merchants had only themselves to thank for their loss, for this reason: if they had delivered the prescribed particulars, naming the variety Fylgia, the farmers would have had no cause of action against the seed merchants, because under section 6 of the Seeds Act, 1920, the particulars would be deemed to be true. I cannot think that that is the right construction of section 6. It cannot be that Parliament intended to deprive the farmers of their remedy. In my judgment, the section must be confined to cases where a buyer is forced to rely on the prescribed particulars for his cause of action. It does not apply to any conditions or warranties of which he can prove a breach without recourse to the particulars. The farmer in this case could do that. He would have been entitled to his damages even if the particulars had been delivered giving the description Fylgia.

In my opinion, therefore, the loss suffered by the seed merchants was due to the breach of contract by the supplier; and they are entitled to recover it, notwithstanding their omission to deliver the particulars.

I agree with my Lord that the appeal should be allowed.

HODSON L.J. I would have dismissed this appeal. In the action between the plaintiff and the defendants the trial judge found that the plaintiff was entitled to judgment against the defendants, the seed merchants, for damages for breach of contract. The plaintiff is a farmer, and he had bought from the defendants wheat seed which had been bought by the defendants from the third party, the farmer who had grown the seed. The seed contracted to be sold by the defendants to the plaintiff was Fylgia, a spring seed proper to be sown in March or April, whereas what was delivered was Vilmorin, a winter wheat proper to be sown in October or November. The plaintiff sowed the wheat in March and suffered damage because he lost substantially the whole value of the crop, and had been put to the cost of growing and removal thereof and of cleaning the land. The defendants had bought the seed from the third party, and relied, as they were entitled to do, upon the description given by the third party on selling the seed. The defendants claim that there is a clear breach of contract in respect of which they are entitled to damages, the measure of which is what they have to pay to the plaintiff under the judgment given against them.

---

[31] [1927] 2 K.B. 311; 43 T.L.R. 354.

The case would be clear but for the difficulty presented by the Seeds Act, 1920. My Lord has already read section 1 (1), (3) and (5), section 2 (1), and section 8, and I would only read in addition section 7 (1): "The Minister may, after consultation "with representatives of the interests concerned (and, as respects "forest tree seeds, after consultation also with the Forestry "Commissioners), make regulations generally for the purpose of "carrying this Act into effect and in particular and without "prejudice to the generality of the foregoing provisions for "prescribing—(*a*) the seeds, whether agricultural, vegetable or "forest tree, to which this Act is to apply: (*b*) the manner in "which samples are to be taken and dealt with: (*c*) any matter "which under this Act is to be prescribed."

By the Seeds Regulations, 1922 (S.R. & O., 1922, No. 915), reg. 2: "The seeds to which the Seeds Act, 1920, shall apply, "are as follows: . . . (*b*) cereal seeds of the following kinds:— "wheat"; and by regulation 3: "The particulars to be stated "in the case of a sale or exposure for sale of seeds or seed "potatoes as required by section 1 of the Seeds Act, 1920, are "as follows:—(*a*) in all cases the name and address of the seller; "(*b*) in all cases (except in relation to seed potatoes) that the "seeds have been tested in accordance with the provisions of the "Seeds Act, 1920; (*c*) in all cases the kind of seeds sold or "exposed for sale, and in the case of cereals, red clover, white "clover, crimson clover and sainfoin, the distinctive name of the "variety of the seeds, or if the distinctive name of the variety is "not known, or the stock is mixed, a statement to that effect."

The defendants were in breach of their statutory duty because, although they had the seeds tested for germination and could have given the whole of the particulars required by the Act, they failed to do so. It is clearly settled by authority that in these circumstances the defendants could not have recovered the price of the seed from the plaintiff (see *Anderson Ld.* v. *Daniel*[32]) because the contract, although legal in its inception, was illegally performed by the defendants, so that although the buyer's rights against the vendor were preserved, the vendor could not enforce his contract against the buyer.

---

[32] [1924] 1 K.B. 138.

The contention of the third party, which was accepted by the trial judge, was that a contract having been performed by the defendants in an illegal manner, they could not put forward that contract as the basis of any claim against the third party. The claim against the third party is as follows: "By reason of the "premises the defendants have suffered and will suffer loss and "damage. They have re-sold the said wheat to the plaintiff and "to other customers as 'Fylgia' spring wheat. The defendants "claim against the third party (i) a declaration that they are "entitled to be indemnified against the amount of any damages "and/or costs for which the plaintiff may recover judgment; "(ii) judgment for any amount which may be found to be due "from the defendants to the plaintiff; (iii) judgment for the "amount, if any, of costs they may be adjudged to pay to the "plaintiff and for the amount of their own costs of their defence "to the plaintiff's claim and of proceedings against the third "party herein; (iv) damages for breach of contract or warranty."

The trial judge said: "The whole of that claim is based on "resale of the wheat. Before the defendants can substantiate "their right to claim against the third party they have to set up "this contract with the plaintiff in order to show that the "damages which they have to pay to the plaintiff flow from the "breach of contract by the third party." He added: "It seems "to me that they (that is, the defendants) cannot set up a "contract, being an illegal contract unlawfully performed by "them, in support of their claim against the third party."

It is true that the contract was not illegal in its inception, nor did it ever become void for illegality. The consequence is that the plaintiff can enforce it against the defendants, but it seems to me, as it did to the judge, that the defendants are in precisely the same difficulty in seeking to recover from the third party as they would be if they sought to enforce the contract against the plaintiff. They could not recover the price of the seed from the plaintiff because of the illegality, whether the plaintiff relied upon breach of warranty or not. Similarly, I think that they cannot rely upon the breach of warranty by the third party to prove their damages when those damages are to be measured by reference to a contract illegally performed by them.

Accepting, as I do, that the contract between the defendants and the third party was a legal contract from beginning to end, and that the third party was in breach of warranty, there is no question but that the defendants are entitled to nominal damages for such breach. Indeed, Mr. MacKenna, for the third party, conceded that this was so. Mr. Scott Cairns, for the defendants, argued that he should be entitled not only to nominal damages but to the full damages claimed since, he said, the point was not precisely covered by the decision in *Anderson Ld.* v. *Daniel*,[32] and it would work an injustice to extend the scope of that decision.

I agree that the members of this court who decided *Anderson Ld.* v. *Daniel*[32] had not this situation in mind, and therefore I do not pray in aid any passages from their judgments which would seem to support any conclusion which would seem to extend the area of their actual decision. Nevertheless, it seems to me impossible, in view of the actual decision in that case, to allow a party who cannot rely on the illegality of performance of his contract for one purpose, to rely on it for another. So far as injustice is concerned, the actual decision in *Anderson Ld.* v. *Daniel*[32] worked an injustice, since the buyer there was enabled to retain fertilizer he had bought from the purchaser and escape payment. The same situation arises in all cases of illegal contracts. When work is done without a licence authorizing the same, it is clear that the person who has obtained the benefit of the work may avoid payment, although he may have no merits. I do not lose sight of the distinction between contracts void for illegality and contracts such as that which is here in question, which is illegal only in its performance, so as to disentitle the perpetrator of the illegality to recover.

However, I think that in principle it is impossible to hold that the perpetrator of the illegality should recover from a third party damages which arise from the performance of a contract when he could not himself sue on that contract because of his illegal performance thereof. I think, therefore, that when the defendants argue that their claim against the third party is not founded on illegality but on breach of a legal contract, the answer is that the argument only carries with it their claim to nominal damages and not those which followed from the performance of their contract with the plaintiff.

Mr. Scott Cairns put forward the alternative argument that he was entitled to damages to be assessed by reference to what he had to pay to the plaintiff, apart altogether from the contract

---

[32] [1924] 1 K.B. 138.

C. A.
1953

MARLES v. PHILIP TRANT & SONS LD. MACKINNON, THIRD PARTY.

Hodson L.J.

which had been illegally performed. These damages, he said, could be recovered as general damages which flowed naturally from the breach of warranty by the third party, because any farmer who sowed Vilmorin thinking he was sowing Fylgia would naturally suffer the damage suffered by the plaintiff. In my opinion, it is inadmissible to award general damages on this footing, since this would enable the defendants to reach by a circuitous route the goal from which they are barred by the illegal performance of their contract with the plaintiff. General damages other than nominal are not, I think, proved in any other way in this case, and, indeed, it appears that no attempt was made at the trial by counsel then representing the defendants to prove substantial damage except on the footing that he was entitled to recover such sum as he might have to pay to the plaintiff.

I reach a conclusion adverse to the defendants with regret, since it may fairly be said that the illegality in the performance of their contract with the plaintiff is in a sense irrelevant to the question whether the defendants have suffered damage from the breach by the third party of his contract with them. I do not, however, see any escape from the consequences of the decision in *Anderson Ld.* v. *Daniel*,[32] which seems to me to lead inevitably to the conclusion at which Lynskey J. arrived. Although the defendants have a good cause of action against the third party, they cannot prove the substantial damage which they seek to claim without proving their own illegal act. The relief sought depends on proof of the illegal act, and therefore I do not think that the defendants can recover.

I would only add on this part of the case that I do not think that the defendants gain assistance from the decisions in *Tinline* v. *White Cross Insurance Association Ld.*[33] and *James* v. *British and General Insurance Co. Ld.*,[34] in which motorists who had to pay damages for negligence so gross as to amount to manslaughter were held to be able to recover on an indemnity from the insurers. In *Haseldine* v. *Hosken*,[35] where a solicitor sought to be indemnified by his insurer against the consequences of his own champerty and failed, the authority of those cases was doubted. I share those doubts in so far as those cases may tend to support the proposition that an assured can get indemnity from his insurers against his own intentional acts of illegality.

---

[32] [1924] 1 K.B. 138.

[33] [1921] 3 K.B. 327.

[34] [1927] 2 K.B. 311.

[35] [1933] 1 K.B. 822.

The third party also relied on section 6 of the Seeds Act. [His Lordship read the section.] On the plain reading of that section the plaintiff would have had no cause of action if the particulars required by section 1 (1) had been delivered, since those particulars, including a statement as to the warranty of the seed, would have been deemed to be true. Therefore the claim against the third party could never have been made if the plaintiff did not have the seed tested himself. If the plaintiff, on the other hand, had ascertained, as a result of a test, that the seed was not "Fylgia" but "Vilmorin," he would not have suffered the damage; so, again, the claim would not have been made. This result is said to be unreasonable, since there appears, so far as the evidence in this case goes, to be no sure test of variety except by growth, which would take so long as to be practically useless except for the purpose of obtaining material for litigation. Section 6 was, no doubt, inserted in the Act for the protection of the seed merchant, and if it has unexpected results I think that it is for Parliament to amend the law, and that the court cannot ignore the provisions. On this ground also I should have thought that the appeal failed.

Appeal allowed.

Solicitors: *C. G. Metson & Co.; Anstey & Thompson, Exeter.*

C. G. M.

NEWBORNE *v.* SENSOLID (GREAT BRITAIN) LD.

C. A.
1953
Feb. 19.

Lord Goddard C.J., Morris and Romer L.JJ.

Contract—Parties—Company—In process of formation—Not registered—Contract of sale purporting to be made by company—Signature of future director below name of company—Whether director could enforce contract.

A contract, which purported to be entered into for the sale of certain goods by Leopold Newborne (London) Ld., was signed "Leopold Newborne (London) Ld.," and underneath was the name Leopold Newborne. On the back of the document were set out the names of Leopold Newborne and M. Newborne as directors of the company. The market fell and when the goods were tendered to the buyers they refused to take delivery. A writ was issued in the name of Leopold Newborne (London) Ld. against the buyers claiming damages for breach of contract, namely, failure to accept the goods. Whilst the case was in progress it was discovered that at the time when the contract was signed the company, Leopold

C. A.
1953

NEWBORNE
v.
SENSOLID
(GREAT
BRITAIN) LD.

Newborne (London) Ld., was not registered, and steps were taken to substitute for the name of the company, as plaintiff, that of Leopold Newborne:—

Held, that Leopold Newborne never purported to contract to sell nor sold the goods either as principal or agent. The contract purported to be made by the company, on whose behalf it was signed by a future director, and inasmuch as the company was non-existent at the material time, the contract was a nullity.

Kelner v. *Baxter* (1866) L.R. 2 C.P. 174, *Schmaltz* v. *Avery* (1851) 16 Q.B. 655, and *Harper & Co.* v. *Vigers Brothers* [1909] 2 K.B. 549; 25 T.L.R. 627, considered.

Decision of Parker J. [1952] 2 T.L.R. 763; [1952] W.N. 491, affirmed.

APPEAL from Parker J.

One Leopold Newborne was forming a limited liability company, to be called Leopold Newborne (London) Ld. He discovered that he could buy from J. G. Gilbert Ld. a quantity of tinned ham, and found a customer who wished to buy it—Sensolid (Great Britain) Ld., the defendants. On March 13, 1951, a contract form, which was headed with a contract number and bore the name and address of Leopold Newborne (London) Ld., 321 High Holborn, London, W.C.1, and gave the telephone numbers and a telegraphic address, was addressed to Messrs. Sensolid (Great Britain) Ld., and ran: "We have this "day sold to you 200 cases each containing six tins whole cooked "boneless shoulders." It then set out the price and other terms, such as those of delivery. On the other side were the names as directors of Leopold Newborne and M. Newborne. The document was signed: "Yours faithfully, Leopold Newborne (London) Ld." and underneath that signature was the name Leopold Newborne. There was an acceptance slip attached to the document: "Sale contract No. S. 117 for 200 cases each "containing six tins whole cooked boneless shoulders," signed by the secretary of the defendant company.

The market fell, and Sensolid (Great Britain) Ld., when the goods were tendered, refused to take delivery on the ground that the sale was a sale by sample and that no sample had been submitted. Thereupon Leopold Newborne (London) Ld. issued a writ against the defendants claiming damages for breach of contract, namely, failure to accept the goods. While the case was in progress the plaintiffs' solicitors discovered that the alleged plaintiff company had not been registered at the time when the contract was made and they took steps to substitute for the name of the alleged plaintiff company the name of

Leopold Newborne. The defendants thereupon contended that Leopold Newborne was trying to sue upon a contract which he had not made, but which purported to have been made by a limited liability company which had not been registered.

PARKER J., having said that the sale was not a sale by sample, held that the point taken by the defendants was sound and gave judgment for them. He delivered the following judgment:—It is clear, therefore, that both parties, both the plaintiff and the defendants, thought that the defendants were contracting with this limited company. In so far as it is material it does not seem to me that it made the slightest difference with whom the defendants were contracting. Jacombe, the secretary of the defendant company, asked me to believe that he was impressed, as it were, with the fact that he was contracting with a company, and that led him to say that he would not have contracted with Mr. Newborne personally if he had known the true facts. I am quite satisfied that from Jacombe's point of view it did not matter whether he was contracting with Mr. Newborne personally or with the company. I am also quite satisfied that the defendants in no way relied on the formation of the company in entering into this contract.

That being so, the position arises as to the effect in law of this contract. Mr. Littman has referred me to *Kelner* v. *Baxter*,[1] and to certain other cases following that. The principle there laid down is that if a person contracts ostensibly as agent for a non-existent principal, as, for example, a company which is not yet formed, he can be held to be himself personally liable. That, indeed, is *Kelner* v. *Baxter*,[1] and it is plain that this principle, that the agent is liable, is not based on breach of warranty of authority, because, as I have said, the principal is not in existence; it is not based on any question of estoppel; but it is based on this principle, that it is only by holding him personally liable that any effect can be given to the contract. In other words, it is permissible for the plaintiff seeking to hold the agent liable to show that that agent, though he has contracted as agent, is himself in fact the principal.

Mr. Littman asserted that this case was really the converse of the position in *Kelner* v. *Baxter*,[1] and he says, and I agree, that it would be an odd result if, in such circumstances as arose in *Kelner* v. *Baxter*,[1] the agent could be held personally liable, and yet would be unable to sue. Mr. Littman went further, and has been able to refer me to *Harper & Co.* v. *Vigers Brothers.*[2] That was a curious case in which the plaintiffs, who were really speculators, entered into a contract as agents for the owners of a steamship with the defendants as charterers. The contract was in this form: "It is this day mutually agreed between H. G. "Harper & Co. as agents for owners of the good steamship . . . "to be named later . . . and Messrs. Vigers Brothers of London, "charterers," and it was signed: "By authority of and as agents "for owners, H. G. Harper & Co." In fact, the plaintiffs in that case had no principals and they sought to sue the defendants. The matter came before Pickford J., who, it is to be observed, adopted firstly a passage in Carver on Carriage by Sea (4th ed., s. 128), where the writer, referring to *Schmaltz* v. *Avery,*[3] said: "Where a charterparty has been made by "an agent expressly on behalf of a principal the agent is "not personally liable upon the contract; even though the "principal be a foreign one; and although he may not "have authorized the supposed agent to make the contract. "If the agent was not authorized no binding contract at all has "been concluded, unless it can be shewn that the agent had no "principal at all and was in fact contracting for himself; in "which case probably he may sue or be sued on the contract."

---

[1] (1866) L.R. 2 C.P. 174.

Pickford J. then went on to approve of the decision in *Schmaltz* v. *Avery*[3]; he distinguished the case he was dealing with from *Sharman* v. *Brandt,*[4] and finally, at the end of his judgment, he said: "For these reasons the suggested distinc"tions between this case and *Schmaltz* v. *Avery*[3] fail, and I "cannot see any distinction between that case and the present "one. The plaintiffs are therefore entitled to recover. But I am "satisfied that, if the plaintiffs had disclosed to the defendants "the true state of affairs before the contract of February 3 was "entered into, the defendants would probably not have made the "contract at all, or, if the contract had been made, the disclosure "would have prevented any litigation." Those are strong words, from which it would appear that in those circumstances the agent could sue the defendants, although the defendants would not have contracted with him, the agent, if they had known the true facts. I should have thought, for myself, that Pickford J. was going a little far there, unless it were that there was no counterclaim for rescission. It seems to me that a contract of that sort would be clearly voidable when the other party found that the person

---

[2] [1909] 2 K.B. 549; 25 T.L.R. 627.
[3] (1851) 16 Q.B. 655.
[4] (1871) L.R. 6 Q.B. 720.

C. A.
1953

NEWBORNE v. SENSOLID (GREAT BRITAIN) LD.

with whom he thought that he was contracting was not the real principal and that he could then claim to have the contract rescinded.

On the strength of those cases it was urged on behalf of the plaintiff that here Mr. Newborne is entitled to assert and to prove that notwithstanding the wording of the contract he was the real principal and was therefore entitled to maintain this action, and that the only defence which the defendants could have would be if they could show that had they known the true facts they would not have contracted with Mr. Newborne personally, in which case they could claim a rescission.

As I have said, I do not think that that was the position here, and, accordingly, if the principles in those cases apply, the plaintiff would be entitled to maintain this action. I should add further that if an agent contracts in such a way as not to exclude his personal liability, then clearly he can sue. Mr. Littman has only faintly relied on this principle, but it seems to me plain that under this contract Mr. Newborne has qualified his signature. In other words, he has by the form of his signature made it clear that he is not undertaking personal liability.

Mr. Pearl, however, argued, and it was an argument which impressed me, that the principle in those cases to which I have referred had no application here. In those cases there was an agent undertaking to do certain things himself as agent for somebody else. In the present case, however, unlike *Kelner* v. *Baxter*[5] and *Harper & Co.* v. *Vigers Brothers*,[6] there is no signature by anybody at all as agent. To bring this case within the principles of those cases the contract, it seems to me, would have to read: "I, Leopold Newborne, on behalf of the company "agree to sell, and have sold to you . . ." and so on, and signed, "Leopold Newborne, by authority of and as agent for the company." In other words, the agent would have to be contracting to do certain things, albeit as agent. Then applying *Kelner* v. *Baxter*[5] he could say, there being no company, that he was the real principal and could sue upon the contract. That, as I understand it, is the principle underlying the decision of Vaughan Williams J. in *Hollman* v. *Pullin*.[7]

But that is not this case. This is a contract in which a limited company purports to sell, and sold in these terms: "Leopold Newborne (London) Ld. We have this day sold to

---

[5] L.R. 2 C.P. 174.

[6] [1909] 2 K.B. 549.

[7] (1884) Cab. & E. 254.

"you . . . (signed) Leopold Newborne (London) Ld." That is typed and underneath it is written: "Leopold Newborne." That seems to me to purport to be the company's signature. The company can only sign by a servant, and it is exactly the same, it seems to me, as if the words "Leopold Newborne" were there as managing director, or as director, or on behalf of the company, the whole thing being the company's signature, and not the signature of an agent who agrees to do certain things on behalf of the company.

It seems to me that the short answer to this case, unfortunately for the plaintiff, is that this company was not in existence, and that the signature on that document, and, indeed, the document itself, the alleged contract No. S. 117, is a complete nullity.

The plaintiff appealed from that judgment.

* *Kenneth Diplock Q.C.* and *Mark Littman* for the plaintiff.
Leonard Pearl for the defendants.

February 19. LORD GODDARD C.J. Mr. Diplock, who has argued the case for the plaintiff, bringing to our attention every point which could possibly be taken, has contended that it is governed by the well-known series of cases of which *Kelner* v. *Baxter*[1] is one of the earliest and perhaps the best known. That was a case in which one Kelner sold wine intending to sell it to a company which was to be formed. The contract showed that it was agreed to be sold to certain men who were the proposed directors of a company which was coming into existence. They agreed to buy. The potential directors intended to buy the wine on behalf of the company, but the company was not in existence at the time the contract was made or at the time when the goods were delivered. They took delivery of the goods and, therefore, it was held that as they had contracted on behalf of a principal who did not exist they must, having received the wine, pay for it. That decision seems to me to stop far short of holding that every time an alleged company purports to contract—when there is no company in existence—everybody who is signing for the company is making himself personally liable.

---

* Owing to the untimely death of the reporter, it is not possible to publish the argument in this appeal.

[1] (1866) L.R. 2 C.P. 174.

Mr. Diplock has also relied strongly on *Schmaltz* v. *Avery*,[2] which lays down a principle, which has been acted on in other cases, notably in *Harper & Co.* v. *Vigers Brothers*,[3] that where a person purports to contract as agent he may nevertheless disclose himself as being in truth a principal. If he entered into a contract as agent he can bring an action in his own name and show that he was in fact the principal. All those cases are well established and we are not departing in any way from those decisions any more than did Parker J. What we cannot find in this case is that Mr. Newborne ever purported to contract to sell as agent or as principal. The contract was one which he was making for the company, and although Mr. Diplock has argued that in signing as he did Mr. Newborne must have signed as agent, since the company could only contract through agents, that was not really the true position.

The company makes the contract. No doubt the company must do its physical acts, and so forth, through the directors, but it is not the ordinary case of principal and agent. It is a case in which the company is contracting and the company's contract is authenticated by the signature of one of the directors. This contract purports to be a contract by the company; it does not purport to be a contract by Mr. Newborne. He does not purport to be selling his goods but to be selling the company's goods. The only person who had any contract here was the company, and Mr. Newborne's signature merely confirmed the company's signature. The document is signed "Yours faithfully, Leopold "Newborne (London) Ld.," and then the signature underneath is the signature of the person authorized to sign on behalf of the company.

In my opinion, unfortunate though it may be, as the company was not in existence when the contract was signed there never was a contract, and Mr. Newborne cannot come forward and say: "Well, it was my contract." The fact is, he made a contract for a company which did not exist. It seems to me, therefore, that the defendants can avail themselves of the defence which they pleaded and the appeal must be dismissed.

MORRIS L.J. I agree, and I find myself in full agreement with the judgment delivered in this case by Parker J. Mr. Diplock has emphasized that the judge found that it did not matter to the defendants whether they were contracting with

[2] (1851) 16 Q.B. 655.

[3] [1909] 2 K.B. 549; 25 T.L.R. 627.

C. A.
1953
NEWBORNE v. SENSOLID (GREAT BRITAIN) LD.
Morris L.J.

Mr. Newborne personally or with the company. Of course, that is so, but that does not mean that the defendants are not entitled, if they so choose, to take the point that they never contracted with Mr. Newborne who was suing them. Mr. Diplock has strongly relied on the language of section 32 (1) (*b*) of the Companies Act, 1948.[4] That section, as I read it, is merely dealing with the way in which a company makes contracts, and I do not find that this present contract was one made with Mr. Newborne as agent for the company. This was a contract which purported to be a contract with the company, and I find myself in full agreement with the way in which this matter was expressed by the trial judge when he said: "This company was "not in existence and . . . the signature on that document, and, "indeed, the document itself . . . is a complete nullity." I agree, therefore, that the appeal fails.

ROMER L.J. I agree with the judgment of Parker J., and also with my Lord's judgment, and there is nothing that I can usefully add.

Appeal dismissed.

[There was also an appeal by the defendants, but in view of the decision of the Court of Appeal this was not pursued.]

Solicitors: *Godfrey Davis & Foster; Ashurst, Morris Crisp & Co.*

C. G. M.

---

[4] Companies Act, 1948, s. 32 (1): "Contracts on behalf of a company "may be made as follows: . . . "(*b*) a contract which if made "between private persons would be "by law required to be in writing, "signed by the parties to be charged "therewith, may be made on behalf "of the company in writing signed "by any person acting under its "authority, express or implied."

1953
Apr. 29, 30;
May 11.

Lord Goddard C.J., Lynskey and Parker JJ.

WURZAL *v.* DOWKER.

Road Traffic—Public service vehicle—Stage or express carriage—Exception of vehicle used on "special occasion"—Fishing trip—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 61 (1) (2), 72—*Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 25.

By the proviso to section 61 (1) of the Road Traffic Act, 1930, a motor-vehicle adapted to carry less than eight passengers shall

[Reported by Miss P. STANLEY, Barrister-at-Law.]

not be deemed to be a stage carriage or an express carriage (so as to require to be licensed as a public service vehicle) by reason only that on occasions of "race meetings, public gatherings and other "like special occasions" it is used to carry passengers at separate fares.

By the proviso to section 61 (2) of the Act, a vehicle used "on "a special occasion for the conveyance of a private party" shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares (so as to require to be licensed as a public service vehicle) by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion.

Where a vehicle was used to take a party of private individuals on a Sunday fishing trip:—

Held, that that was not a "special occasion" within the meaning of the proviso to subsection (2) of section 61 of the Act. The words "special occasion" in that proviso have the same meaning as that which they bear in the proviso to subsection (1), and refer, not to the views and intentions of the members of the private party, but to a special local occasion which is the object of the journey being undertaken.

Section 61 of the Road Traffic Act, 1930, was not altered by, and is in no way inconsistent with, section 25 of the Road Traffic Act, 1934. The conditions in section 25 are not definitive of what is a special occasion, but are merely additional conditions to what apart from them would amount to a special occasion.

Miller v. *Pill* [1933] 2 K.B. 308, 315, 316, 317, criticized but applied.

Victoria Motors (*Scarborough*) *Ld.* v. *Wurzal* [1951] 2 K.B. 520 considered.

CASE STATED by Sheffield Justices.

Informations were preferred under the Road Traffic Act, 1930,[1] on behalf of the licensing authority for public service vehicles

---

[1] Road Traffic Act, 1930, s. 61: "(1) Public service vehicles shall, for "the purposes of this Part of this "Act and the regulations made there-"under, be divided into the following "classes:—

"(a) Stage carriages; that is to say, "motor vehicles carrying passengers "for hire or reward at separate fares "(any or all of which are less than "one shilling for a single journey "or such greater sum as may be "prescribed), stage by stage, and "stopping to pick up or set down "passengers along the line of route, "and any other motor vehicles carry-"ing passengers for hire or reward at "separate fares and not being express "carriages as hereinafter defined:

"(b) Express carriages; that is to "say, motor vehicles carrying passen-"gers for hire or reward at separate "fares (none of which is less than one "shilling for a single journey or such "greater sum as may be prescribed) "and for a journey or journeys from "one or more points specified in "advance to one or more common "destinations so specified, and not "stopping to take up or set down "passengers other than those paying "the appropriate fares for the journey "or journeys in question: . . .

"Provided that a motor vehicle

against the respondent, the proprietor of a coach business, charging him with having, on seven successive Sundays, unlawfully permitted a motor-vehicle to be used as an express carriage within the meaning of the Road Traffic Acts, 1930 to 1937, other than under a road service licence granted by the licensing authority for public service vehicles contrary to section 72 of the Road Traffic Act, 1930.

The following facts were proved or admitted before the justices. The respondent was the proprietor of a business known as Ideal Coaches and the registered owner of two motor-coaches numbered respectively KOG 447 and KPJ 249. On the Sundays, August 17, 24 and 31, and September 7, 14 and 28, 1952, respectively, the motor-coach KOG 447 and on September 21 the motor-coach KPJ 249 were hired by the respondent to a committee member of the Philadelphian Working Men's Club to take members of the club on fishing trips. According to the work tickets relating to the journeys the destination in four cases was stated to be Boston, in two cases Boston area, and in one case Tattershall. The respondent had no licence to use a vehicle as an express carriage on any of the material dates.

It was conceded by the appellant that all the conditions specified in section 25 (1) of the Road Traffic Act, 1934, were satisfied, and it was agreed that the only issue before the justices was whether on the facts the occasions of the journeys were

"adapted to carry less than eight "passengers shall not be deemed to "be a stage carriage or an express "carriage by reason only that on "occasions of race meetings, public "gatherings and other like special "occasions it is used to carry passen-"gers at separate fares.

"(2) It is hereby declared that "where persons are carried in a motor "vehicle for any journey in considera-"tion of separate payments made by "them, whether to the owner of the "vehicle or to any other person, the "vehicle in which they are carried "shall be deemed to be a vehicle "carrying passengers for hire or "reward at separate fares, whether "the payments are solely in respect "of the journey or not:

"Provided that a vehicle used on "a special occasion for the convey-"ance of a private party shall not "be deemed to be a vehicle carrying "passengers for hire or reward at "separate fares by reason only that "the members of the party have made "separate payments which cover their "conveyance by that vehicle on that "occasion."

S. 72: "(1) Subject to the provisions "of this section the commissioners "may grant to any person applying "therefor a licence (in this Act re-"ferred to as a 'road service licence') "to provide such a road service as "may be specified therein, and a "vehicle shall not be used as a stage "carriage or an express carriage "except under such a licence. . . .

"(10) If any person uses a vehicle "or causes or permits it to be used "in contravention of this section, or "being the holder of a road service "licence wilfully or negligently fails "to comply with any of the conditions "attached to that licence, he shall be "guilty of an offence: . . ."

special occasions within the meaning of section 61 (2) of the Road Traffic Act, 1930.

The justices were of the opinion that there was reasonable doubt whether the vehicles were used otherwise than on a special occasion as aforesaid and dismissed the said information.

The prosecutor appealed.

J. P. Ashworth for the appellant. The facts of this case, on the interpretation of section 61 (1) and (2) of the Road Traffic Act, 1930, do not make the occasion a " special occasion." For it to be a " special " one within the meaning of the Act it must be an occasion not only " special " to the private party but special to the whole locality or the public. In section 61 (1) reference is made to " race meetings, public gatherings and other like special " occasions," and it is submitted that " special occasion " in section 61 (2) should be given a similar meaning. *Miller* v. *Pill*,[2] in which Humphreys J. stated the interpretation of the section now contended for, is directly in point and governs this case. The decision in *Miller* v. *Pill*[2] was in no way disturbed by section 25 of the Road Traffic Act, 1934, which only tightened up the regulations relating to " special occasion " with a series of further conditions. Further, there was nothing in the cases decided after *Miller* v. *Pill*[2] which detracted from its authority or altered the position. [Reference was made to *Birmingham and Midland Motor Omnibus Co. Ld.* v. *Nelson*[3]; *Nelson* v. *Blackford*[4]; *Sidery* v. *Evans and Peters*[5]; *Huddersfield Police Authority* v. *Watson*.[6]] *Miller* v. *Pill*[7] was not cited to the court in *Victoria Motors (Scarborough) Ld.* v. *Wurzal*.[8] The principle in *Miller* v. *Pill*[7] has been unchallenged for 20 years and should not now be disturbed.

James P. Comyn for the respondent. It is essentially a question of fact whether an occasion is " special " or not, and it would be unduly dangerous if the court were to lay down principles of law to apply to particular facts. There has been some confusion between subsections (1) and (2) of section 61 in the cases cited. The cases are not clear whether a private party alone is sufficient to make the occasion a " special " one. [Counsel

[2] [1933] 2 K.B. 308; 49 T.L.R. 437.

[3] [1933] 1 K.B. 188; 48 T.L.R. 620.

[4] [1936] 2 All E.R. 109.

[5] (1938) 55 T.L.R. 54; [1938] 4 All E.R. 137.

[6] [1947] K.B. 842; 63 T.L.R. 415; [1947] 2 All E.R. 193.

[7] [1933] 2 K.B. 302; 49 T.L.R. 437.

[8] [1951] 2 K.B. 520; [1951] 1 T.L.R. 837; [1951] 1 All E.R. 1016.

discussed the authorities cited for the Crown and also referred to *Macmillan* v. *Western S.M.T. Co. Ld.*[9] and *Newell* v. *Cross.*[10]] *Miller* v. *Pill*[11] was heard before the Road Traffic Act, 1934, and was decided on the facts alone; it does not decide what the Crown claims. The ejusdem generis rule should not be applied to the proviso to section 61 (2), dealing with other conditions; it is the same phrase in a different context and the two should not be married. The Crown's argument at its highest is that there must be speciality in the locality, but it is submitted that a private party is always a special occasion; the element of frequency is protected by section 25 (1) of the Road Traffic Act, 1934.

Cur. adv. vult.

LORD GODDARD C.J. I will call upon Parker J. to read the first judgment.

PARKER J. stated the facts, referred to section 61 (2) of the Road Traffic Act, 1930, and continued: The sole question for the justices was whether on the facts found the vehicle being used on any Sunday was being used on a "special occasion," and in this connexion it appears that the justices were invited to deal with the matter on the basis that, if the user of the vehicle on the first Sunday was a user on a special occasion, the user on each of the other Sundays was also a user on a special occasion. In dismissing the information the justices said: "We were of "opinion that these journeys were made in the nature of outings "and were not of a general nature, but remained special, both by "reason of the distance travelled, the purpose of the outings, and "the place of the outings."

On behalf of the appellant it is contended that before it can be said that a vehicle is being used on a special occasion there must be some evidence that the journey is being undertaken to partake in what is a special occasion in the locality to which the journey is made, and that it is not enough that the journey itself is a special occasion from the point of view of the members of the party. In other words, it is said that if there had been an annual angling match at Boston on the first Sunday concerned, the vehicle would have been used on a special occasion, but that as there was no special event in progress the use of the vehicle could not be a use on a special occasion, even if it was the party's annual outing.

---

[9] 1933 S.C. (J.) 51.

[10] [1936] 2 K.B. 632; 52 T.L.R. 489; [1936] 2 All E.R. 203.

[11] [1933] 2 K.B. 308; 49 T.L.R. 437.

Surprising as this may sound, and whatever views I might otherwise be inclined to hold, apart from authority, I consider that we are bound by the decision of this court in *Miller* v. *Pill.*[1] In that case the owner of a motor-omnibus hired the vehicle to one Rowe to take a party from Launceston to Looe. It was an annual event, Rowe having on each of the last four years arranged a similar trip to Looe. There was nothing at Looe which could be said to be a special occasion there. In his argument for the respondent the Solicitor-General posed the question in this way: "The important question in the case is whether "'special occasion' means, as the appellant contends, an "occasion special to the private party, such as a day at the "seaside, or whether, as the police contend, it has a more "restricted meaning confined to an occasion special to the whole "locality or to the public." He went on to contend that "special "occasion" in subsection (2) should be given the same meaning as in subsection (1), where it is clear that the words have the latter meaning. Lord Hewart C.J. said[2]: "In my opinion, "although the matter is by no means free from doubt, there is "great force in that argument. I think that it would be wrong "and misleading if the term 'special occasion' were used in two "different senses in the space of a few lines in the same section "of the same Act of Parliament. The justices found as a fact "that the occasion was not a special occasion and, although there "may be much to be said to the opposite effect, I have come to "the conclusion that the argument for the appellant is unsuccessful and that this appeal must be dismissed."

Avory J., after expressing considerable doubt, said[3]: "My "inclination at one time was to think that the words 'special "'occasion' in subsection (2) might have a different and more "extended meaning than when they are used in subsection (1), "and that the occasion under consideration should be regarded "quoad the purpose of the private party to ascertain whether it "was a 'special occasion' within the proviso to the subsection. "I am not, however, prepared to differ from the view that prima "facie the words ought to be read in the same sense in the two "subsections. I am satisfied to decide this case on the ground "that there is no sufficient reason for differing from the finding

---

[1] [1933] 2 K.B. 308, 312.

[2] Ibid. 315.

[3] Ibid. 316.

"of fact by the justices that the occasion was not a 'special "'occasion.'"

Humphreys J. said[4]: "On the point whether the occasion "was a 'special occasion' within the proviso to section 61 (2), "if I were dealing with that proviso alone, I should come to the "conclusion that the expression 'special occasion' refers to something more than the views and intentions of the members of the "party and points to something which can be described as a special "occasion in the locality and was the object of the journey being "undertaken. And when I turn to the proviso to subsection (1) "of the same section and find there the same expression as part "of the phrase 'on occasions of race meetings, public gatherings "'and other like special occasions,' it appears to me to be a "strong indication that the view which I have expressed is right, "because I think that the words in subsection (2) should be "accorded the same meaning as those in subsection (1), from "which they are separated by only a few lines of print. Accordingly, I agree that a 'special occasion' within the meaning of "subsection (2) must be a special occasion occurring at the place "which is the object of the excursion, or, in other words, something of the same nature as the kind of occasion referred to in "the proviso to subsection (1), and that it is not enough that it "should merely be a special occasion from the point of view of "the persons forming the private party. I agree that the matter "is by no means free from difficulty, but in the result I agree "with the other members of the court."

It is to be observed that unless the words in question had the restricted meaning contended for by the Solicitor-General the court could not have upheld the conviction. Accordingly, I think that the decision in that case is binding upon this court.

It was, however, urged on the part of the respondent that section 25 of the Road Traffic Act, 1934, which imposed conditions which have to be complied with before it can be said that the vehicle is used on a "special occasion," has in some way altered the position. Those conditions, however, as was held in *Victoria Motors (Scarborough) Ld.* v. *Wurzal*,[5] are not definitive of what is a special occasion, but are merely additional conditions to what apart from them would amount to a special occasion. Reading both the Acts together, as we are bound to do, I cannot see anything in section 25 of the Act of 1934 which is so plainly inconsistent with the accepted construction of section 61 (2) of

---

[4] [1933] 2 K.B. 318.

[5] [1951] 2 K.B. 520; [1951] 1 All E.R. 1016.

1953

WURZAL
v.
DOWKER.

Parker J.

the Act of 1930 as to necessitate one to hold that the latter subsection has been impliedly amended. Indeed, when section 25 (1) of the Act of 1934 was passed Parliament must be taken to have had in mind the principle enunciated in *Miller* v. *Pill*,[6] and if it had been desired to amend section 61 (2) of the Act of 1930, plain words to that effect would surely have been used. Applying the principle above referred to to the facts of this case, it is plain that on no Sunday was the vehicle in question used on a special occasion.

I should add that it was, in my view, unfortunate that the justices were persuaded to deal with the matter on the basis of the concession made by the prosecution, and referred to above, namely, that if the use of the vehicle on the first Sunday was use on a special occasion the use on each of the other Sundays was also on a special occasion. Apart from this concession, the frequency of the journeys would probably on any view of the meaning of "special occasion" have forced the justices and this court to hold that the offences had been proved.

In the result the case should in my view go back to the justices with a direction to convict. Sentence is, of course, a matter for them, but in the circumstances of this case they may well think that a nominal fine is appropriate.

I am authorized to add that LYNSKEY J. agrees with this judgment.

LORD GODDARD C.J. I agree that this court is bound by the decision in *Miller* v. *Pill*,[6] and that consequently this appeal must succeed. That case was not brought to the attention of the court when *Victoria Motors (Scarborough) Ld.* v. *Wurzal*[5] was before us, and would not have affected the decision if it had been. But I regret that, in considering in the *Victoria Motors* case[5] what could amount to a special occasion, I gave illustrations, some of which I now see could not be so regarded in view of the decision in *Miller* v. *Pill*.[6] It seems that a day's excursion, by a Sunday school or mothers' union party cannot be treated as a special occasion so long as that decision stands, and we cannot overrule it. It is only right that I should take responsibility for having misled the justices by the illustrations I gave per incuriam. But I may, I hope, be permitted to say, with all respect, that I feel great doubt about the decision in *Miller* v. *Pill*,[6] and it is apparent that Avory J., who was a member of the

[5] [1951] 2 K.B. 520.

[6] [1933] 2 K.B. 308.

court, also did, though he did not dissent. As we are bound by the decision, it is perhaps unprofitable to discuss it, but I desire to state briefly why I thought that such occasions as I illustrated could be regarded as special in relation to the use of a motor-vehicle by a private party.

I agree that when the same words are used twice in a statute prima facie they should be given the same construction, but the context may require a different interpretation. The first proviso is not dealing with motor-vehicles used by private parties, but with taxi cabs or private hire cars in effect plying for hire and picking up casual travellers, thus competing with omnibuses. This is permitted only in connexion with race meetings, public gatherings and other like special occasions. To use a homely illustration, it provides for cabs at stations picking up passengers who may be travelling quite independently of one another and taking them at so much a head to a neighbouring racecourse or gathering. The second proviso deals with a private party who hire a motor-coach for a special occasion, and the stringent provisions of section 25 of the Act of 1934 must be satisfied before the party can be regarded as private. If it was intended to limit the use of the vehicle to journeys for attending such things as race meetings or public gatherings, I should have expected the proviso to make this clear by a reference to the previous proviso where, it will be observed, the word " like " appears, though it does not in the latter. From a common-sense angle I think that most people would say that a village school treat was a special occasion, certainly in the lives of those attending it. The result of *Miller* v. *Pill*,[6] however, seems to be that if a treat were planned to a neighbouring seaside town, and was fixed for a day on which a statue or a drinking fountain was to be unveiled as a memorial to a deceased mayor or member of Parliament, providing the children were obliged as part of their outing to attend this festivity the treat would be a special occasion, but otherwise it would not. The justices, therefore, came to a wrong decision on this matter, but it is I and the other members of the court who heard the *Victoria* case [5] who ought to take the blame, if any.

On another matter the justices were, in my opinion, also misled, this time by the prosecutor. The concession he made, to which Parker J. has referred, was, I think, incorrect, and should not have been made. The journeys to which the information related seem to have formed part of the ordinary programme of the fishing season, and though but for *Miller* v. *Pill*,[6] the first trip might have been regarded as a special occasion, I cannot see how seven consecutive Sunday outings could be. They were habitual and not special. I agree that the appeal must be allowed and cordially endorse the concluding sentence of Parker J.'s judgment.

---

[5] [1951] 2 K.B. 520.

[6] [1933] 2 K.B. 308.

Appeal allowed.

Solicitors: *Treasury Solicitor; Hosking & Berkeley for A. B. Thorneloe, Sheffield.*

---

[6] [1933] 2 K.B. 308.

SPIERS *v.* WARRINGTON CORPORATION.

1953
Oct. 14.

Lord Goddard C.J., Sellers and Havers JJ.

Education—School attendance—Powers of head teacher—Discipline—Pupil's dress—Girl sent to school wearing slacks—Excuses for non-attendance—Whether statutory list exhaustive—Education Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *s.* 39.

By section 39 of the Education Act, 1944, if a child of compulsory school age fails to attend regularly at the school of which he or she is a registered pupil the child's parent is guilty of an offence unless the absence was due to certain specified causes including sickness or any unavoidable cause.

The headmistress of a county secondary school, who was empowered by the articles of government to "control the internal "organization, management and discipline of the school," refused to admit a girl of compulsory school age wearing slacks unless she produced a doctor's note stating that there were compelling medical reasons for such dress. No such note was produced:—

Held, that in acting as she did the headmistress was only acting in a matter of discipline which must be within the competence of any headmistress of any school; and accordingly that in persistently sending his daughter to school in slacks the father was not causing her to attend school regularly and was guilty of an offence against section 39 of the Act of 1944.

Saunders v. *Richardson* (1881) 7 Q.B.D. 388 applied.

Although the list of reasonable excuses for not causing a child to attend school in section 49 of the Education Act, 1921, was not exhaustive, the list of excuses in section 39 (2) of the Act of 1944 is.

London County Council v. *Maher* [1929] 2 K.B. 97; 45 T.L.R. 534 distinguished.

CASE STATED by the Hundred of West Derby quarter sessions appeal committee.

1953

SPIERS
v.
WARRINGTON
CORPORATION.

On December 18, 1952, the defendant, Ernest Spiers, was convicted by Warrington justices on an information alleging that between certain dates being the parent of Eva Spiers, a child of compulsory school age, he was guilty of an offence against section 39 of the Education Act, 1944,[1] in that Eva Spiers, a registered pupil at the Richard Fairclough Girls' Secondary Modern School, failed to attend school regularly. He was fined 10s.

At the hearing of the defendant's appeal to quarter sessions it was proved or admitted that the girl was registered as a pupil at the school in question in August, 1950, and attended dressed in the normal school attire of gym-slip and blouse. From October, 1950, to October, 1951, she was away ill, having contracted rheumatic fever for the second time. She then returned to school normally, but in January, 1952, she appeared wearing slacks. The headmistress informed her and her parents that there was a school rule that slacks should not be worn, but that she would waive that rule if a medical note were produced. No such note was produced, and thereafter during the winter months the girl was sent to school in slacks and refused admittance by the headmistress. From October 13, 1952, to December 3, 1952, she was only present at school on two days out of a possible forty-six.

Article 9 (*b*) of the articles of government of the school provided: " The headmistress shall control the internal organization, management and discipline of the school."

---

[1] Education Act, 1944, s. 39: "(1) If any child of compulsory "school age who is a registered pupil "at a school fails to attend regularly "thereat, the parent of the child shall "be guilty of an offence against this "section. (2) In any proceedings for "an offence against this section . . . "the child shall not be deemed to "have failed to attend regularly at "the school by reason of his absence "therefrom with leave or—(*a*) at any "time when he was prevented from "attending by reason of sickness or "any unavoidable cause; (*b*) on any "day exclusively set apart for religious "observance by the religious body "to which his parent belongs; (*c*) if "the parent proves that the school ". . . is not within walking distance "of the child's home, and that no "suitable arrangements have been "made by the local education autho- "rity either for his transport to and "from the school or for boarding "accommodation for him at or near "the school or for enabling him to "become a registered pupil at a "school nearer to his home."

S. 17: "(1) For every county "school . . . there shall be an instru- "ment providing for the constitution "of the body of managers or governors "of the school in accordance with the "provisions of this Act, . . . and the "instrument providing for the consti- "tution of the body of governors of "a secondary school is in this Act "referred to as an instrument of "government. (3) Subject to the pro- "visions of this Act . . . :—(*b*) every "county secondary school . . . shall "be conducted in accordance with "articles of government made . . . by "an order of the local education "authority and approved by the "Minister, . . . ; and such articles "shall in particular determine the "functions to be exercised in relation "to the school by the local education "authority, the body of governors, "and the head teacher respectively."

Quarter sessions allowed the defendant's appeal, being of the opinion that the headmistress was wrong in excluding the girl, and that the defendant was acting reasonably in that what he did was in the interest of his child whose health and life he was seeking to safeguard.

Warrington Corporation now appealed.

G. J. Bean for the corporation. The question is whether the headmistress had authority to refuse to admit to her school a pupil who was not dressed in accordance with the school rules but was wearing slacks. If she had such authority and a pupil was repeatedly sent to school dressed in that way, and with no medical certificate to show that such costume was essential for her health, it follows that her parent is liable to conviction under section 39 of the Education Act, 1944. It is submitted that local education authorities have power to recommend a certain form of dress for schoolchildren. Section 17 of the Act of 1944 provides that every school shall be conducted in accordance with articles of government made by the local education authority, which articles shall determine the functions to be exercised in relation to the school by (among others) the headmistress. In the case of the school in question, rule 9 (*b*) of the articles of government provided that the headmistress should " control the internal organization, management and discipline of the school."

Section 39 of the Act of 1944 requires the attendance at school of pupils of compulsory school age and imposes a penalty on a parent for not causing his child to attend school; and three excuses only are specified in the section, the only one remotely in point here being the first, namely, " sickness or any unavoidable cause." This court decided in *Jenkins* v. *Howells*[2] that " unavoidable cause " in section 39 meant something in the nature of an emergency. There is authority for the proposition that a parent who sends a child to school in circumstances in which he knows that the child will not be admitted, with the result that the child does not fulfil the required number of attendances, is guilty of an offence: *Saunders* v. *Richardson*[3] and *Fox* v. *Burgess*,[4] *per* Salter J. In sending a child to school a parent must be presumed to give the headmistress authority to enforce reasonable regulations: *Rex* v. *Newport (Salop) Justices; Ex parte Wright*,[5] *per* Lord Hewart C.J. The matter is purely one of law, and quarter sessions misdirected themselves in considering the seemliness or otherwise of this girl's slacks: it is not a matter for them, but for the headmistress, to determine what is proper school uniform: *Kruse* v. *Johnson*,[6] *per* Lord Russell C.J.

---

[2] [1949] 2 K.B. 218; 65 T.L.R. 305; [1949] 1 All E.R. 942.

[3] (1881) 7 Q.B.D. 388.

[4] [1922] 1 K.B. 623, 631; 38 T.L.R. 289.

Anthony Edmondson for the defendant. The defendant was in fact convicted for the breach of a school rule which was not even in writing, as it should have been. If a parent is to be held liable to a criminal prosecution for breach of a school rule the local education committee must keep strictly to the procedure which is laid down. It is true that a headmistress is entitled to control all matters relating to discipline, but disobedience to her rules should not result in a criminal prosecution of the parent: her remedy is to suspend the pupil and let matters take their course. *London County Council* v. *Maher* [7] shows the principle applicable: the test is purely one of reasonableness.

[SELLERS J. But the wording of section 49 of the Act of 1921, under which that decision was given, is different from that of section 39 of the Act of 1944.]

[LORD GODDARD C.J. It seems as if section 39 of the Act of 1944 was passed with the purpose of abolishing the decision in *London County Council* v. *Maher*.[7] The section has been tightened.]

London County Council v. *Maher* [7] is cited in Stone's Justices Manual as the authority for my proposition. If that is wrong it means that since the Act of 1944 parents can be prosecuted for many offences which were unknown to the Act of 1921. It is submitted that the facts in the present case amounted to "unavoidable cause" within section 39.

LORD GODDARD C.J. This is a case stated by the appeal committee for the Hundred of West Derby, who allowed an appeal by the defendant, Ernest Spiers, from his conviction of the offence created by section 39 of the Education Act, 1944, in that his child, who was a registered pupil at the Richard Fairclough Girls' Modern School, had failed to attend regularly thereat between certain dates.

---

[5] [1929] 2 K.B. 416, 428; 45 T.L.R. 477.

[6] [1898] 2 Q.B. 91, 100; 14 T.L.R. 416.

[7] [1929] 2 K.B. 97; 45 T.L.R. 534.

1953

Spiers
v.
Warrington
Corporation.

Lord Goddard C.J.

The girl in question was regarded by her parents, and reasonably regarded by her parents, as a delicate child. She had had rheumatic fever on two occasions, and the parents had been advised that she should be warmly clothed, and in the winter they insisted on sending her to school dressed in slacks. The headmistress of the school objected to that, and said that she would not admit the child to school dressed in that manner unless the parents could produce a medical certificate or a medical note to say that it was essential that the child should be dressed in that manner. The parents took the view that it was entirely for them to decide how the child should be clothed, and that they were not going to accept any dictation. They refused, therefore, to send the child to school dressed in any other way than I have described. The consequence was that the child did not keep the necessary number of attendances, and thereupon the education authority prosecuted the father for not causing the child to attend school. The justices of Warrington Borough convicted and fined him 10s. He appealed to quarter sessions, who reversed the decision, and the case now comes before us really upon a point of law whether or not the parents had the right to say that they were not going to send the child dressed in a particular way or whether the headmistress was entitled to say she was not going to admit the child in that way, and if she did, what was the effect upon her.

Referring first to the old authorities which are firmly established, *Saunders* v. *Richardson*[1] and *Fox* v. *Burgess*[2] decided that if a parent sent a child to school in circumstances when he knew that the child would not be admitted, he was committing an offence because he was not causing the child to attend school regularly. *Saunders* v. *Richardson*[1] was decided in the old days before education was entirely free, and a parent who had an objection to paying for education insisted on sending the child to school without paying the necessary coppers for the week's education, and knew quite well that the child would not be admitted unless he or she brought the money. It was held that that conduct amounted to a failure to cause the child to attend regularly, and Lord Coleridge, in giving the leading judgment, said[3]: "It is idle to shut our eyes to the fact that the more "limited construction would enable many unwilling parents to "keep their children uneducated, by doing nothing but sending "them to the door of the school under conditions which it is well

---

[1] (1881) 7 Q.B.D. 388.

[2] [1922] 1 K.B. 623; 38 T.L.R. 289.

[3] 7 Q.B.D. 393.

1953

SPIERS
v.
WARRINGTON
CORPORATION.

Lord Goddard
C.J.

"known would prevent their being taken in." I read those words because here there is no question but that the headmistress had told the parents that she would not admit their daughter to the school dressed in this particular manner unless the child brought with her a note from a doctor to say that it was necessary for her to be dressed in that manner. They never have done that, and it is hardly to be supposed that any doctor could be found to say that it was essential to her health that she should wear slacks. The parents, therefore, continued to send the child to school in circumstances in which they knew that she would not be admitted.

The school in question is a county secondary school, and it is necessary to look at the provisions of the Education Act, 1944, as this matter really depends on that Act. We are not deciding this case as a social matter; it is simply a point of law. [His Lordship read section 17 (1) and (3) and continued:] Obviously a head teacher must be responsible for the discipline of the school and, indeed, in this particular case the articles provide that the headmistress "shall control the internal organization, management and discipline of the school . . . shall exercise supervision "over the teaching and non-teaching staff, and shall have the "power of suspending pupils from attendance for any cause which "she considers adequate, but on suspending any pupil she shall "forthwith report the case to the governors, who shall consult "the local education authority." I quote the last part about the time of suspension simply because quarter sessions seem to have thought that the headmistress in this case was suspending the girl and ought to have reported it to the governors, who should then consult the local education authority. In point of fact, I think that that is a false point. The headmistress did not suspend this child at all. She was always perfectly willing to take her in; all that she wanted was that she should be properly dressed. Suspending is refusing to admit to the school; in this case the headmistress was perfectly willing to admit the girl but was insisting that she be properly dressed.

The next thing to which I must call attention—and this is where I think that quarter sessions have really been misled and have gone wrong—is section 39 of the Education Act of 1944, which is now the governing provision. [His Lordship read section 39 (1) and (2) and continued:] In 1929 *London County Council* v. *Maher*,[4] a case under the then Education Act, the Education Act, 1921, was decided. By section 49 of the Act of

---

[4] [1929] 2 K.B. 97; 45 T.L.R. 477.

1921: " Any of the following reasons shall be a reasonable excuse " for the purposes of this Act and the byelaws made thereunder, " namely:—(*a*) That the child had been prevented from attending " school by sickness or any unavoidable cause; (*b*) That there is no " public elementary school open which the child can attend within " such distance, not exceeding three miles, measured according " to the nearest road from the residence of the child, as the bye- " laws may prescribe; (*c*) In the case of non-compliance with a " byelaw requiring a parent to cause his child to attend school, " that the child is under efficient instruction in some other " manner: " In *London County Council* v. *Maher*[4] the parents set up as an excuse for not sending the child to school a matter which was not covered by either subparagraphs (*a*) (*b*) or (*c*), and the justices who heard the summons found that the excuse which the father had set up was a reasonable one. When the matter came up on case stated, the court pointed out that section 49 did not appear to be, if I may put it compendiously, exhaustive: it gave three excuses which the court must accept as defences, but it left it open to a parent to show other causes which the court might consider reasonable or not. It was held that if the justices below had found that the excuse was reasonable the court could not go behind that finding. That is in accordance with the well-known rule of law on which this court always proceeds, that the facts are not for us. We are bound by the facts found by the justices, and they held that under the then law it was open to the justices to find any matters as a reasonable excuse if they liked.

I think that quarter sessions approached this case bearing in mind *Maher's* case,[4] but the law has been altered, and the Education Act of 1944, be it noted, is not a consolidating Act. The long title to the Act is: " An Act to reform the law relating " to education in England and Wales," and one of the changes which have been made is that section 39 of the Act of 1944 has been substituted for section 49 of the Act of 1921. It appears to the court highly probable that the reason for that was that it was considered desirable to abolish the decision in *Maher's* case [4] and to substitute for it a new section which would not leave it open to justices to find any reasonable excuse parents might set up, but to confine the excuses for not sending a child to school to the reasons set out in subsection (2) (*a*), (*b*) and (*c*). That is the only construction which this court feels able to put upon section 39 (2).

---

[4] [1929] 2 K.B. 97.

We were reminded of *Jenkins* v. *Howells*,[5] which was heard in 1949, and in which I was sitting with Oliver and Cassels JJ. I do not hesitate to say that if it had been open to us there to find that there was a reasonable excuse for not sending the child to school, we would have found it. It was a very hard case, but we felt that the statute was too strong; we could not go into the question of reasonableness.

Quarter sessions came to the conclusion that the defendant and his wife were acting reasonably in that they were acting in the interest of their child, whose health and life they were seeking to safeguard, and that the case was not made out. They have attached to the case a note of their judgment, from which it is perfectly obvious that they thought that the headmistress was acting reasonably in insisting on uniformity of dress among the girl pupils of the school, but we are not here to balance which is the more reasonable or which is the more desirable. The headmistress obviously has the right and the power to prescribe the discipline for the school, and in saying that a girl must come to school not wearing a particular costume unless there is a compelling reason of health, surely she is only acting in a matter of discipline, and a matter which must be within the competence of the headmaster or headmistress of any school, whether it is one of the great public schools or a county secondary or county primary school. There must be somebody to keep discipline, and of course that person is the headmistress.

If it was a matter of whether parents reasonably believed that it was in the interests of the child to wear some particular dress, as I pointed out in the course of the argument, not in the least wanting to treat this matter as anything but perfectly serious, there are people in this country who believe, and honestly believe, that at any rate in the summer it is desirable in the interests of their children that they should wear no clothes at all except what the barest necessities of decency require. One sees in London squares and certainly in the country little children running about with no clothes except bathing slips, and one cannot suppose that a headmistress or headmaster would be obliged to admit children to school wearing no clothes at all. Yet if this view put forward to quarter sessions were right, provided that the parents honestly held that belief and one could not say that it was unreasonable for the health of the child to be exposed to sunlight or wear no clothes in the summer, the headmaster or headmistress would be obliged to take any little boy or girl who came to school with no clothes: it would be a perfectly absurd position.

---

[5] [1949] 2 K.B. 218; 65 T.L.R. 305; [1949] 1 All E.R. 942.

In my opinion the reason why we must reverse the decision of quarter sessions and restore the decision of the justices is because quarter sessions approached this matter from the wrong angle. They thought, perhaps following *Maher's* case,[6] that it was simply a question whether the parents had a reasonable ground for doing what they did. On the other hand, that is not the question. The question is: was the headmistress in communicating her refusal to allow the girl to come to school in this way acting within her rights? We hold that she was not only within her rights, but that it was her duty; and the parent, knowing that the child would not be admitted, and insisting on her being dressed in this way, brought himself within the reasoning in *Saunders* v. *Richardson* [7] and accordingly committed an offence.

For these reasons I would allow the appeal.

SELLERS J. I agree. It would appear that the appeal committee of the Hundred of West Derby approached their consideration of this matter on the authority of *London County Council* v. *Maher*,[8] and they considered the whole of the circumstances and came to the conclusion that the parent before them was acting reasonably. That authority, as my Lord has pointed out, is an authority under a different Act, the Education Act of 1921, whereas this matter falls to be considered under section 39 of the Education Act of 1944, which is quite different and which does not, as I see it, leave it open to the tribunal to consider matters other than those that are there set down. This child did in fact fail to attend regularly at the school and section 39 (1) provides that in those circumstances the parent of the child shall be guilty of an offence against the section. But there is a further provision that in proceedings for an offence which took place under that section in respect of a child who is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave, and then there are the three particular cases set out, and they do cover quite a wide field for exemption from responsibility to attend. The only one applicable for consideration by the appeal committee in this case was section 39 (2) (*a*), that is to say, did the facts establish that at any time this child was prevented from attending by reason of sickness or any unavoidable cause? On

---

[6] [1929] 2 K.B. 97.

[7] 7 Q.B.D. 388.

[8] [1929] 2 K.B. 97.

1953

SPIERS v. WARRINGTON CORPORATION.

the facts, that excuse could not be established and the appeal committee came on the facts before them to an erroneous conclusion.

HAVERS J. I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for J. P. Aspden, Warrington; Piesse & Sons for Browne, Sturgess & Wheeler, Warrington.*

S. C.

1953
Oct. 15.

Lord Goddard C.J., Sellers and Havers JJ.

BILLING *v.* PILL.

Criminal Law—Larceny—Fixture—Army hut—Erected for temporary purpose—Bolted to concrete foundation—Whether "attached to or "forming part" of the realty—Larceny Act, 1916 (6 *&* 7 *Geo.* 5. *c.* 50), *s.* 1 (3).

By section 1 (3) of the Larceny Act, 1916: "Everything which "has value . . . and if adhering to the realty then after severance "therefrom, shall be capable of being stolen: Provided that— . . . "anything attached to or forming part of the realty shall not be "capable of being stolen by the person who severs the same from "the realty, unless after severance he has abandoned possession "thereof."

An army hut, which was constructed in seven sections, rested on a concrete foundation, the floor of the hut being secured to the foundation by bolts let into the concrete. The hut was one of a number erected by the War Office during the war on land used as a gun emplacement. In 1946 the army vacated the huts, and in 1947 the local authority was instructed to demolish them. In 1951 the appellant, without lawful authority, dismantled the hut in question, removed it from the site and re-erected it on his own land. He was convicted by justices of stealing the hut. On appeal, on the grounds that the justices were wrong in law in convicting as the hut was attached to or formed part of the realty within the meaning of the proviso to section 1 (3) of the Larceny Act, 1916, and was not capable of being stolen since the appellant had not abandoned possession after severing it:—

Held, that the Larceny Act, 1916, was a consolidating Act not intended to alter the law; that the proviso to section 1 (3) was intended to preserve the old common law position; that the words

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

"anything attached to or forming part" of the realty in it should be read as meaning "anything attached so as to form part" of the realty; and that when something in the nature of a chattel was affixed to land the true test was whether it was meant to be a temporary fixture not intended to form part of the realty. The hut was a chattel erected for a purely temporary purpose and did not become attached to or form part of the realty merely because, in order to steady it, it was bolted to the concrete foundation. It remained a chattel capable of being stolen and the appellant had been rightly convicted.

Holland v. *Hodgson* (1872) L.R. 7 C.P. 328 considered.

CASE STATED by Cornwall justices.

On February 27, 1953, an information was preferred against Cecil Lloyd Billing, the appellant, under section 2 of the Larceny Act, 1916, for that he did between January 1 and October 31, 1952, feloniously steal an army hut valued at £50, the property of the War Office.

At the hearing of the information the following facts were proved or admitted: During the war the War Office erected a number of huts on a site at Tregantle, Cornwall, which was used as a gun emplacement. The huts were sectional in construction, and the hut which was the subject of the charge comprised seven sections without doors or windows and rested on a concrete foundation, the floor of the hut being secured to the concrete base by bolts let into the concrete. The army vacated the huts in 1946, but they remained under the control of the War Office. Squatters occupied the huts, and between 1947 and 1952 the St. Germans rural district council, at the request of the Ministry of Health, cleared the site of squatters by removing the doors and windows of the huts and demolishing them as they became vacant. In May or June, 1951, the appellant, without lawful authority, dismantled the hut in question and, without abandoning possession thereof, took seven sections away, subsequently re-erecting the hut on his own land. He later informed the police that he had bought the hut from a contractor who had been demolishing huts on an adjoining site.

It was contended on behalf of the appellant that the hut was not capable of being stolen under section 2 of the Larceny Act, 1916, as it was attached to and formed part of the realty, and that, after severing it from the realty, he had not abandoned possession of it before removing it from the site.

For the respondent it was contended that the hut was not attached to nor formed part of the realty so as to prevent it forming the subject of a charge under section 2 of the Act.

The justices were of the opinion that the hutted camp was a temporary camp and that the huts were movable buildings which did not form part of the realty; that the hut was a purely temporary structure which was capable of being stolen within the provisions of section 2 of the Act. The other facts necessary to constitute the offence of larceny having been proved, they convicted the appellant.

W. M. Huntley for the appellant. The justices found that the floor of the hut was secured to a concrete base by bolts let into the concrete. "Secured" is a stronger word than "attached," and if a thing is secured it must follow that it was attached so as to come within the proviso to section 1 (3) of the Larceny Act, 1916. This hut accordingly came within the words "anything attached to or forming part of the realty" in the proviso to subsection (3) and the appellant not having abandoned possession of it, it was not capable of being stolen. Although there are many authorities—mainly divergent—on the question of attachment to land, they are irrelevant to this matter. At common law, before the Larceny Acts were passed, lands, tenements, incorporeal and corporeal hereditaments could not from their very nature be the subject of larceny. The effect of the Acts was to extend the field of larceny to certain things which were not capable of being stolen at common law: see section 8 of the Larceny Act, 1916.

[LORD GODDARD C.J. Is it your submission that a person who steals a temporary building does not commit an offence?]

Yes, and reliance is placed on a passage in the judgment of Blackburn J. in *Holland* v. *Hodgson* [1] to the effect that an article affixed even slightly to the land should be considered as part of the land unless the circumstances are such as to show that it is intended all along to continue as a chattel, the onus lying on those who contend that it is a chattel. The proviso qualifies the substantive part of subsection (3) and creates exceptions to the general rule with regard to things attached to the realty. If there is any doubt about the meaning of the word "attached" in the subsection the meaning should not be extended so as to make something an offence which the Act did not intend should be one.

Malcolm Wright for the respondent. The hut in question is not attached to the realty. The fact that a chattel is in some way fastened to the land or to a building to keep it in position does not mean that it is "attached" so as to form part of the land or building within the meaning of the proviso to subsection (3); e.g., a carpet which is nailed to a floor to keep it in position is not "attached to the realty." The purpose of the attachment must be taken into consideration, and the question in this case is whether it was intended to make the hut a fixture or not. Construing subsection (3) of section 1 of the Act, "attached to" corresponds with "fixtures," and "forming part of the realty" corresponds with the words "growing things and ore from mines." A useful statement of the law regarding landlord and tenant fixtures is to be found in Halsbury's Laws of England, Hailsham ed., vol. 20, para. 107.

---

[1] (1872) L.R. 7 C.P. 328, 335.

In the old common law there was a broad distinction between chattels and land; probably the earliest reported case referring to this distinction is *The Foresters Case*,[2] where a forester was indicted for stealing growing trees but was not arraigned as the trees were part of the land. Then the doctrine developed that after severance of a growing thing it might be stolen if there was a fresh act of taking after the severing. The Larceny Act, 1916, a consolidating Act, has given effect to the common law. Another interpretation of subsection (3) which is in the respondent's favour is that the proviso can be reconciled with the first part if it is read as stating that a person who severs an article shall not be guilty of theft unless before taking it he has abandoned possession of it. That is simply an extension of the old common law rules.

Huntley replied.

Lord Goddard C.J. This is a case stated by justices for the county of Cornwall, which raises an interesting and short point on the law of larceny, in the course of which we have had the advantage of a clear and careful argument of Mr. Huntley for the appellant and Mr. Wright for the respondent. [His Lordship stated the facts and continued:] There is no question that there was evidence upon which the justices could find that the hutted camp was a temporary camp. They found that the hut in question could be moved and that it was a purely temporary structure.

We have to turn now to the Larceny Act, 1916, remembering that that Act was intended to be a consolidating Act and was not meant to alter the law in any way. There are dicta in cases in the Court of Criminal Appeal of Avory J. who, it is well known,

[2] (1338) Y.B. 11 & 12 Edw. III, 641 (Rolls Series 31s).

was the draughtsman of the Act, that it was not intended to alter the law of larceny. By the old common law of larceny there were many difficulties in the way of preferring a charge of theft in respect of anything which, if I can use a convenient expression, savoured of the land. A great many additions were made to the law from time to time by statute, most of which will be found in section 8 of the Larceny Act of 1916, but the section with which we are concerned is section 1 (3), which defines the offence of larceny. That subsection provides: "Everything which has "value and is the property of any person, and if adhering to "the realty then after severance therefrom, shall be capable of "being stolen." If one stops there, it is clear that what the Larceny Act says is that anything adhering to the land that can be severed may be stolen. There follows a proviso, which has given rise to the difficulty in this case: "Provided that—(*a*) "save as hereinafter expressly provided with respect to fixtures, "growing things, and ore from mines, anything attached to or "forming part of the realty shall not be capable of being stolen "by the person who severs the same from the realty, unless after "severance he has abandoned possession thereof."

The construction which I put upon that section is this: it starts by saying that things which adhere to the realty can be stolen after they have been severed, but a person who actually severs them, subject to the provisions of section 8 of the Larceny Act, and one or two other sections with which we are not concerned, cannot be convicted of larceny unless after the severance he has left the thing on the land and then returned, on what one may call a separate excursion, and taken the thing because, when he has taken it, it has reverted to the possession of the person on whose land it was. Therefore, the whole of this case depends on the meaning of the words "anything attached to or forming part "of the realty." Those words might be read as meaning "attached so as to form part." It seems odd that a thing can be attached to the realty and yet not form part of the realty. If it is really attached to the realty and will form part of it, one has to consider whether the thing is attached to the realty in the sense in which those words are used in the subsection.

In my opinion, the proviso is intended to preserve the old common law position that one cannot be charged with stealing real property. What is real property? Land is real property, and if there are things that are so attached to the land that they become part of it then, in the language which conveyancers and others have generally applied, those things become, as between a landlord and tenant, landlord's fixtures as they are sometimes called. I do not need to go into the elaborate distinctions which were dealt with by Lord Ellenborough in *Elwes* v. *Maw* in Smith's Leading Cases (13th ed., vol. 2, p. 193) as to how fixtures pass between mortgagor and mortgagee and landlord and tenant. The question is: is the thing a fixture? What is a fixture? The commonest fixture is a house which is built into the land, so that in law it is regarded as part of the land. The house and the land are one thing. If, therefore, one has something, such as lead pipes, which are an integral part of the house, it follows that as the house is an integral part of the land, the pipes are also, and therefore the pipes will be fixtures and they will be attached to or will form part of the land. If there is a thing which by its nature is a chattel which is affixed in some way, it seems to me that the true test is: was it really meant to be a temporary fixture, not intended to be part of the house or the land. In a house it may be for the purposes of decoration. Many questions have arisen with regard to tapestries, fireplaces, ornamental chimney-pieces and other things of that kind.

The matter is summed up admirably by du Parcq L.J. in the Laws of England, Hailsham ed., vol. 20, para. 107: "Whether "a chattel has been so affixed to the land or buildings as to "become a fixture depends on the object and purpose of the "annexation, and if the chattel can be removed without doing "irreparable damage to the premises, neither the method nor "the degree of annexation, nor the quantum of damage that "would be done to the chattel or to the premises by the removal, "affect the question save in so far as they throw a light upon "the object and purpose of the annexation. If the object and "purpose was for the permanent and substantial improvement "of the land or building, the article will be deemed to be a "fixture, but if it was attached to the premises merely for a "temporary purpose or for the more complete enjoyment and "use of it as a chattel, then it will not lose its chattel character "and it does not become part of the realty." That is a useful exposition of the law, and if one requires authority to support it, there is a very good instance in *Holland* v. *Hodgson*.[1] Blackburn J.,[2] than whom there was no higher authority on these matters, giving his judgment in that case, emphasized that one must look at the circumstances; and that is also pointed out in the paragraph I have read from the Laws of England.

---

[1] (1872) L.R. 7 C.P. 328.

[2] Ibid. 335.

Can anybody doubt that the hut in question was erected for a temporary purpose? It can be removed without doing any damage to the freehold at all. It rests upon a concrete bed which is let into the land. I should say that there is no question but that the concrete bed has become part of the land, but the hut which stands upon it has not become part of the land merely because some bolts have been put through the floor of the hut to stabilise or steady it. It was erected merely for a temporary purpose so that the Army personnel who were going to the site for a presumed temporary purpose, to man a gun emplacement during the war, would have somewhere to sleep.

In my opinion, it would be quite wrong to hold that this hut was attached to or formed part of the realty. It was not so attached any more than if one takes a garden seat out into one's garden and, because the seat may be in an exposed position and liable to be blown over, one drives a spike through it to hold it to the ground. In one sense that is an attachment, but it is not an attachment sufficient to make it part of the realty. It is simply a spike put in to hold the chattel firm. In my opinion, this hut was a chattel, remained a chattel and is capable of larceny. Therefore, the justices came to a right decision in law in convicting.

SELLERS J. I agree with my Lord's judgment, for the reasons which he has given.

HAVERS J. I agree.

Appeal dismissed.

Solicitors: *Reed & Reed, agents for Caunter, Venning & Harward, Liskeard; Jaques & Co., agents for Stephens & Scown, St. Austell.*

DEEBLE *v.* ROBINSON.

C. A.

1953
Oct. 12;
Nov. 10.

Somervell, Denning and Romer L.JJ.

[Plaint J. 167.]

Landlord and Tenant—Leasehold property—New tenancy—"Shop"—Dairy—Retail milk round—Whether dairy a "shop"—Statute—Interpretation clause—Relevance of ordinary meaning of word—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *s.* 74—*Leasehold Property (Temporary Provisions) Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *ss.* 10 (1) (2) (4), 20.

The applicant applied under section 10 (2) (*c*) of the Leasehold Property (Temporary Provisions) Act, 1951, for the grant of a new tenancy of certain premises which he leased, on the ground that a separate part of the premises, namely, a shed used as a dairy, was a "shop" and occupied for the purpose of retailing milk. The applicant ran a milk round, delivering to customers at their houses some 75 gallons a day. No milk was sold at the shed, which was used for housing spare bottles, a refrigerator and other articles in connexion with the business.

By section 20 of the Act of 1951: "'shop' means premises "occupied wholly for business purposes, and so occupied wholly or "mainly for the purposes of a retail trade or business."

The county court judge held that the shed was not a shop within the meaning of the Act and dismissed the application. The applicant appealed:—

Held, per Somervell and Romer L.JJ. (Denning L.J. dissenting) that the judge had come to the right conclusion and the appeal failed.

Per Somervell L.J. It is difficult to reconcile the words "retail "trade or business carried on in the shop," which appear in subsections (2) and (4) of section 10, with a definition which makes "shop" include premises in which the retail trade or business is not carried on. If the legislature had intended to give the wider meaning I should have expected the words "whether carried on "in the premises or not" to be added to the definition. Plain words are necessary to establish an intention to interfere with common law or contractual rights, and the words used in the statute are inapt to include premises which are plainly not shops.

Per Romer L.J. On the construction of section 10 of the Act it appears to me that in order to qualify for a renewed tenancy a lessee must show that a retail trade or business is carried on in his premises, or a separate part thereof. Mere occupation of premises for purposes of sales which are effected elsewhere is not enough. This view excludes the dairy from the Act—a result which is not surprising, for nobody would think of describing the shed as a "shop" within the ordinary acceptation of that word.

Per Denning L.J. (dissenting). In section 20 Parliament has expressly ordained that the expression "shop" shall mean "premises occupied wholly for business purposes, and so occupied "wholly or mainly for the purposes of a retail trade or business." That definition covers both the dairy and the stable. "Purposes of "a retail trade or business" include not only the actual selling of the goods but also the buying and storing of them. When Parliament has specifically declared what the expression "shop" means in the Act I do not think that it is open to the courts to say that it means something else, nor is it permissible to cut down its statutory meaning by reference to its popular meaning.

APPEAL from Judge Caporn, sitting at Doncaster County Court.

The applicant was the owner of a milk round, and he applied for the grant of a new tenancy pursuant to Part II of the Leasehold Property (Temporary Provisions) Act, 1951. The premises in question consisted of two dwelling-houses and a yard. In the yard was a shed used by the applicant for the storage of spare bottles, a refrigerator, and other articles used in his business. There was also a stable in which he kept his horse. It was contended by the applicant that the shed was a "shop," in which he carried on a retail trade or business, within the meaning of sections 10 and 20 of the Act of 1951.[1]

---

[1] Leasehold Property (Temporary Provisions) Act, 1951, s. 10: "(1) "The provisions of this part of this "Act shall have effect for enabling "the occupier of a shop under a "tenancy to which this section "applies (hereinafter referred to as "'the expiring tenancy') to apply "to the court for, and subject to the "provisions of this Act to obtain, "the grant of a new tenancy where "apart from the next following section the expiring tenancy would "come to an end immediately before "the date of the commencement of "this Act or within the period of two "years beginning with that date, and "would so come to an end by effluxion "of time or by the expiration of a "notice to quit given by the landlord, "whether before or after the commencement of this Act. (2) This "section applies to a tenancy the "subject of which—(*a*) consists of "a shop, or (*b*) consists of a "shop and of living accommodation "occupied wholly or mainly by the "tenant or by a person who is employed by the tenant for the purposes of the retail trade or business "carried on in the shop, or (*c*) includes a separate part which consists of a shop or which consists of "a shop and of such living accommodation as is mentioned in the last "foregoing paragraph. . . . (4) In "the case of an expiring tenancy the "subject of which falls within paragraph (*c*) of subsection (2) of this "section and not within paragraph (*b*) "thereof, any new tenancy granted "under this part of this Act shall "if the landlord so requires be a "tenancy of the whole of the subject of the expiring tenancy, and "otherwise a tenancy of the separate "part consisting of the shop or consisting of the shop and of living "accommodation, as the case may "be."

S. 20: "'shop' means premises "occupied wholly for business purposes, and so occupied wholly or "mainly for the purposes of a retail "trade or business."

Shops Act, 1950, s. 74: "'shop'

C. A.
1953

DEEBLE
v.
ROBINSON.

The county court judge held that the shed was not a shop within the meaning of the Act, and dismissed the application. The applicant appealed.

J. F. Drabble Q.C. and *H. S. Pears* for the applicant. The application for the grant of a new tenancy was made under section 10 (2) (*c*) of the Leasehold Property (Temporary Provisions) Act, 1951, which applies to premises which include a separate part which consists of a shop or of a shop and living accommodation occupied wholly or mainly by the tenant or a person who is employed by the tenant for the purposes of the retail trade or business carried on in the shop. By section 20 " shop " means premises occupied wholly for business purposes, and so occupied wholly or mainly for the purposes of a retail trade or business. The business carried on by the applicant is a retail business, and the shed is used wholly as a dairy for the purposes of the business.

A. S. Orr and *W. H. Greenwood* for the respondent. The definition has to be read in the context of the Act. Section 10 refers to " the retail trade or business carried on in the shop." The applicant's business was not carried on in the dairy. The ordinary dictionary meaning of shop is a place where ordinary retail selling and the serving of customers take place: see *per* Lord Trevethin C.J. and *per* Avory J. in *Dennis* v. *Hutchinson.*[2] In *M. & F. Frawley Ld.* v. *Ve-Ri-Best Co. Ld.*[3] Jenkins L.J. said that the expression " retail trade " clearly connoted in its primary sense a business of selling goods to members of the public who resorted to the shop or premises, where the business was carried on, for the purpose of making purchases. It is submitted that this dairy shed is not a shop within the meaning of the Act.

Cur. adv. vult.

November 10. The following judgments were read:

SOMERVELL L.J. In these proceedings the applicant applied for the grant of a new tenancy of certain premises on the ground that a " separate part " was occupied for the purpose of retailing

---

" includes any premises where any " retail trade or business is carried on. " ' retail trade or business ' includes the business of a barber or " hairdresser, the sale of refreshments or intoxicating liquors, the " business of lending books or periodicals when carried on for purposes " of gain, and retail sales by auction, " but does not include the sale of programmes and catalogues and other " similar sales at theatres and places " of amusement."

[2] [1922] 1 K.B. 693, 697, 698.

[3] [1953] 1 Q.B. 318, 326; [1953] 1 All E.R. 50.

milk. The application was made under section 10 (2) (*c*) of the Leasehold Property (Temporary Provisions) Act, 1951. [His Lordship read the relevant parts of section 10 and continued:] The applicant has a milk round, delivering to customers at their houses some 75 gallons a day. The premises consist of two dwelling-houses and a yard. In that yard is a shed used for the applicant's spare bottles, refrigerator, and other articles. This is the "separate part" primarily relied on. If the applicant is right with regard to the shed, the stable where he keeps the horse that takes round the milk might also be covered. Some six to eight pints are sold on the premises, not at the shed, but these can, in my view, be disregarded, and no reliance was placed upon them. The judge came to the conclusion that the shed was not a shop within the meaning of the Act.

The applicant was, I think, carrying on a retail trade. This trade was not carried on in the shed. The shed was used for the trade. The shed, I think, quite plainly, was not a shop in the ordinary sense of the word. It is submitted, however, that it is within the definition to be found in section 20, which is as follows: "'shop' means premises occupied wholly for business "purposes, and so occupied wholly or mainly for the purposes "of a retail trade or business." Also, "'retail trade or business' "has the same meaning as in the Shops Act, 1950, except that "it does not include the sale of intoxicating liquor" and so on. The argument is as follows. The definition of "shop," it is said, covers premises used for the purpose of retail trade although not a shop or shops in the ordinary meaning of the word. An example would be the head office of a company running a number of retail shops. This would not be a shop, but it is said it would be "used for the purposes of a retail trade or business," and therefore included by the definition.

Many observations can be found in reported cases on interpretation clauses. In *Reg.* v. *Pearce* [1] Lush J. said: "But I "think an interpretation clause should be used for the purpose "of interpreting words which are ambiguous or equivocal, and "not so as to disturb the meaning of such as are plain." Lush J. was dealing with a clause in the form "X includes." I agree with what is stated in Craies on Statute Law, 5th ed., p. 197, that "where the word defined is declared to '*mean*' "so and so, the definition is explanatory and *prima facie* "restrictive." The writer goes on to say that "where the word

---

[1] (1880) 5 Q.B.D. 386, 389.

"defined is declared to '*include*' so and so, the definition is "extensive." I agree, but applying the principle laid down by Lush J. one would not, unless forced, even when the definition is in the form "includes," carry the extension beyond border line or doubtful cases. Applying these observations, the form of words here is inapt to include premises which, like the shed, are plainly not shops.

Reliance was placed on the fact that in section 74 of the Shops Act, 1950, "'shop' includes any premises where any retail "trade or business is carried on." These latter words do not occur in the present definition. The two Acts were dealing with different subject matters. The Shops Act was dealing with hours and conditions of work, Sunday trading and so on. One would have expected the definition to make clear that it applied to any premises where any retail trade was carried on. The present Act is dealing with leases. The restrictive words at the beginning of the definition limit the definition to premises wholly occupied for business purposes. I agree that the definition might have ended with some such words as "carried on therein." On the other hand, if the legislature had intended the wider meaning I should have expected the words "whether carried on "in the premises or not" to be added. The definition has to be read in the context of the Act. Section 10 (2) and (4) both contain the words "the retail trade or business carried on "in the shop." This phrase is difficult to reconcile with a definition which makes "shop" include premises in which the retail trade or business is not carried on. There is a further consideration. It has often been laid down that plain words are necessary to establish an intention to interfere with common law or contractual rights. I do not think the shed in question here is plainly covered by the relevant sections for reasons which I have given. For these reasons I would dismiss the appeal.

DENNING L.J. Mr. Deeble has a milk round. He sells milk to people at the doors of their houses. He runs his business from a dairy building where he keeps his equipment, refrigerator, spare milk bottles, and so forth, and a stable where he keeps his horse and float. His round is seven streets adjoining the premises. He does not actually have a shop as ordinarily understood. His lease of these premises is coming to an end, and he wants to stay on there. This depends on whether the premises

C. A.
1953

DEEBLE
v.
ROBINSON.

Denning L.J.

come within the definition of a "shop" in the Leasehold Property (Temporary Provisions) Act, 1951.

In section 20 Parliament has expressly ordained that in that Act the expression "shop" means "premises occupied wholly "for business purposes, and so occupied wholly or mainly for the "purposes of a retail trade or business." I think that definition covers both the dairy and the stable. The trade of a milk roundsman carried on by Mr. Deeble was plainly a "retail "trade" and he occupied those premises for the purposes of that trade. It seems clear to me that "the purposes of a retail "trade or business" include not only the actual selling of the goods, but also the buying and storing of them, the office work, and other ancillary things necessary for the carrying on of the business.

Mr. Alan Orr conceded that the dairy was within the definition of "shop" in the Act of 1951 if that definition is literally interpreted; but he urged us to limit the statutory definition by reference to the general conception of a shop. There must, he said, be something which would popularly be considered to be a shop before the Act can apply. I do not agree with this contention. When Parliament has specifically declared what the expression "shop" means in the Act, I do not think it is open to the courts to say that it means something else. Nor is it permissible to cut down its statutory meaning by reference to its popular meaning. Just as mathematicians, in order to facilitate their reasoning, frequently use one symbol to denote a complicated expression, so also Parliament, in order to simplify its language, often uses one short word to denote a complex subject-matter. It saves writing it out in full every time. In such a case, whenever a question arises on the interpretation of the statute, the word is to be given its statutory meaning as if it were written out in full.

It is very different, of course, when Parliament says that a familiar word is to "include" some specified thing, as in the Shops Act, 1950, when it says the word "shop" *includes* any premises where any retail trade or business is carried on, and the expression "retail trade or business" *includes* the business of a barber or hairdresser. In such a case the word or expression must be given its ordinary meaning (which is not defined) and in addition it must, in relevant cases, be given the special meaning which the statute says is to be included, which I will call the "included meaning." The included meaning may be inserted out of caution, so as to make sure that it is included in the ordinary meaning: or it may be inserted as supplemental, so as to add something to the ordinary meaning. But in cases where the included meaning is not applicable or relevant, or is doubtful or ambiguous, the ordinary meaning must prevail.

A good instance is *M. & F. Frawley Ld.* v. *Ve-Ri-Best Co. Ld.*,[2] where it was held a builder's business was not within the ordinary meaning of a "retail trade or business." In the present case, in relation to the word "shop" Parliament has not said that it "includes" so and so. It has said that it "means" so and so. When Parliament has been thus specific we are not at liberty to depart from it. I readily concede this, however: If the statutory definition were obscurely worded or led to patent injustice, it would be quite permissible to ignore the literal interpretation and seek a reasonable one: and it would be quite right to seek guidance from the popular meaning of the word. But in this case the literal interpretation coincides with what is just and reasonable.

Let me give some illustrations. Take a case where a shopkeeper owns the shop himself but has a tenancy of a store at the back which is essential to his business. It would be a grave defect in the Act if he were not protected in regard to the store. Take next a case where a coal merchant rents an office in which he takes orders but delivers the coal direct from the station yard to his customers. The office can hardly be called a shop in ordinary parlance, but surely he should be protected in regard to it. Take last a case where a fruiterer and greengrocer has a store in which he keeps his goods, but he does all his business by going round from door to door. He should be protected even though he has no place which would ordinarily be called a shop. These illustrations convince me that there is no reason why we should not give this statute its literal interpretation, and every reason why we should do so.

In further support of the literal interpretation, I would mention that the legislature seems in this Act to have deliberately departed from the definition of "shop," which appears in all the Shops Acts from 1912 to 1950, and to have done so with the intention of bringing in cases such as those I have mentioned, instead of leaving them in doubt as they were before: see *Wallace* v. *Dixon*,[3] discussed in *Summers* v.

---

[2] [1953] 1 Q.B. 318; [1953] 1 W.L.R. 165; [1953] 1 All E.R. 50.

[3] [1917] 2 I.R. 236.

Roberts.[4] The only argument to the contrary derives from a phrase in section 10 (2) (*b*) and section 10 (4) (*a*) of the Act. Those provisions give protection to living accommodation if it is occupied by a person who is employed for the purposes of "the "retail trade or business carried on in the shop." It would look at first sight as if the draftsman in using that phrase had in mind the ordinary meaning of a shop. But I see no difficulty in giving the word "shop" in that phrase its statutory meaning. A retail trade or business does not consist merely of selling over the counter. It is carried on, not only in the selling portion of the premises but also in the storage portion. In the present case the retail trade is carried on "in" the dairy, even though sales are not actually made there. If Mr. Deeble himself lived in rooms over his dairy or his roundsman lived there, he would be protected in respect of the living accommodation also as well as of the dairy. I see nothing in this contrary to the intention of Parliament but everything in favour of it.

It is said, however, that there is much significance in the word "in." The retail trade must, it is said, be carried on "in" the shop, not "from" it. This seems to me to give an altogether excessive emphasis to a preposition and to create an anomaly which the statutory meaning avoids. I think it is our duty to give the word "shop" in this statute the meaning which Parliament says it is to have, and not to give it a meaning of our own. In my opinion the dairy and the stable were each a "shop" within the Act and I would allow the appeal accordingly.

ROMER L.J. The argument for the applicant in this case has at least the merit of simplicity. He points to the definition of "shop" in section 20 (1) of the Leasehold Property (Temporary Provisions) Act, 1951, and says that his dairy falls within it and that therefore he is entitled to a new tenancy in accordance with the provisions of section 10 of the Act. The definition of "shop" in section 20 is, "'shop' means premises occupied wholly for "business purposes, and so occupied wholly or mainly for the "purposes of a retail trade or business." To the suggestion that premises do not constitute a shop unless trade is carried on in them—and not merely from them—the applicant's answer is that the legislature's deliberate departure from the definition of "shop" contained in section 74 of the Shops Act, 1950, establishes a contrary intention. There is some force in this contention

---

[4] [1944] K.B. 106; 60 T.L.R. 102; [1943] 2 All E.R. 757.

(although, as my Lord has pointed out, the statutes were dealing with different subject-matters) and it is perhaps strengthened by the fact that the definition of "retail trade or business" in the Act of 1950 is substantially and expressly preserved in the Act of 1951. Nevertheless (although the question at issue by no means depends solely, in my opinion, on the way in which "shop" is defined) there are certain considerations which tend to a narrowing of the apparent width of the definition of "shop" in section 20.

In *M. & F. Frawley Ld.* v. *Ve-Ri-Best Co. Ld.*,[5] Somervell L.J. said "The general character of the word to be defined "must colour the definition." What, then, is the general character of a shop? There is upon this question some judicial authority. "Now the essential element in a shop is that people "can shop in it" (*per* Greene L.J. in *Ritz Cleaners* v. *West Middlesex Assessment Committee*[6]). "Prima facie a shop is a "place where goods are sold by retail and stored for sale" (*per* Lord Trevethin C.J. in *Dennis* v. *Hutchinson*[7]). "It seems to "be quite clear that the ordinary dictionary meaning of 'shop' is "a place where ordinary retail selling and the serving of cus-"tomers takes place" (*per* Avory J.[8]). Further, in the *Ve-Ri-Best* case Jenkins L.J. said[9] that the expression "retail trade" clearly connotes in its primary sense a business of selling goods to members of the public who resort to the shop or premises where the business is carried on, for the purpose of making purchases. In these circumstances one would approach any statutory definition of shop with some sort of expectation, at all events, that what Greene L.J. described in the above citation as the "essential element" would not be wholly abrogated; and had it not been for the argument founded on the jettisoning of the 1950 definition I should see no reason to suppose that that element was not preserved by section 20 of the Act of 1951.

As I have previously indicated, however, the question before us on this appeal does not, in my opinion, fall to be determined wholly according to whether the applicant's dairy does or does not come within the definition of shop in section 20 (1) of the Act of 1951. That question is only a part of the broader problem which we have to decide, namely, whether the applicant has succeeded in bringing his case within section 10 (2) (*c*) of the Act, for if he has not succeeded in this endeavour he has no claim to the new tenancy for which he is asking. The definition of "shop" in section 20 (1) is incorporated in section 10 (2) (*c*) and is undoubtedly an element of importance in construing the latter provision; nevertheless, in accordance with well-established principles, the provision has to be interpreted in the light of the whole of the language used. In order to arrive at a conclusion as to the meaning and effect of section 10 (2) (*c*), it tends to clarification, I think, to write it out in extenso, incorporating in express language the ingredients which appear in the provision only referentially.

---

[5] [1953] 1 Q.B. 318, 323.

[6] [1937] 2 K.B. 642, 671; 53 T.L.R. 588; [1937] 2 All E.R. 368.

[7] [1922] 1 K.B. 693, 697; 38 T.L.R. 263.

[8] [1922] 1 K.B. 698.

[9] [1953] 1 Q.B. 318, 326.

So written it provides as follows: "This section applies to a "tenancy the subject of which includes a separate part which "consists of premises occupied wholly for business purposes and "so occupied wholly or mainly for the purposes of a retail trade "or business (as defined in the Shops Act, 1950) or which con-"sists of such premises as aforesaid and of living accommodation "occupied wholly or mainly by the tenant or by a person who is "employed by the tenant for the purposes of the retail trade or "business carried on in the said premises."

Whatever might be the true meaning and effect of the definition of shop in section 20 of the Act, if taken by itself it appears to me that the concluding words introduce Greene L.J.'s "essential element" in section 10 in no uncertain terms. The words show, in my opinion, that the draftsman was envisaging premises on which—not from which—a retail trade or business was being carried on. That this must be so is, as I think, established by considering what the position would be if the applicant had on his premises some living accommodation which was occupied by one of his roundsmen. If the applicant is right in his argument on this appeal he could get a new tenancy of the dairy itself even though his sales are effected elsewhere; it seems plain, however, that he could not get a renewal of the living accommodation, for he would be unable to show that it was occupied by a person who was employed by him "for "the purposes of the retail trade or business carried on in the "shop."

The applicant's argument thus involves a somewhat remarkable anomaly, if accepted—an anomaly which would, perhaps, be even stranger if, in the circumstances supposed, the living accommodation was occupied, not by a roundsman, but by the

C. A.
1953

DEEBLE
v.
ROBINSON.

Romer L.J.

applicant himself. On the construction, then, of section 10 it appears to me that in order to qualify for a renewed tenancy a lessee must show that a retail trade or business is carried on in his premises, or a separate part thereof, and that the mere occupation of premises for the purposes of sales which are effected elsewhere is not enough. This view, if right, excludes the applicant's dairy from the Act—a result which is not, I think, altogether surprising, for nobody would think of describing the dairy as a shop within the ordinary acceptation of that word.

The conclusion at which I have arrived is, I think, in conformity with the decision of this court in the *Ve-Ri-Best* case.[10] In that case the court held that the words "retail trade or "business" might include the rendering of certain categories of services as well as the sale of goods. The application by the tenants for a renewal of their tenancy was, however, rejected on the ground that the services which they rendered were performed not on the demised premises but elsewhere, viz., at the homes or houses of their customers and that the demised premises, therefore, did not constitute a "shop." By parity of reasoning, where the retail trade or business consists of selling goods, the premises are not, in my opinion, a "shop" for the purposes of the Act unless the goods (at all events in the main) are sold to the customers on the premises themselves. This was indeed the view of Jenkins L.J. in the *Ve-Ri-Best* case where, in the course of his judgment, he said,[11] with reference to section 10 (2), "That "provision, I think, is perhaps indirectly relevant as showing "that the Act contemplates that the retail trade or business, by "virtue of which the shop qualifies as such under the definition, "will be carried on in the shop." I respectfully agree with that view and for the reasons which I have stated I would dismiss the appeal.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Corbin, Greener & Cook, for Dawson & Burgess, Doncaster; Sharpe, Pritchard & Co. for Ernest Briggs & Co., Doncaster.*

A. W. G.

---

[10] [1953] 1 Q.B. 318.

[11] Ibid. 325.

1953
Oct. 2, 5,
6, 7, 8.

Evershed M.R.,
Jenkins and
Morris L.JJ.

ATLANTIC MARITIME CO. INC. *v.* GIBBON.

[1950 A. No. 2795.]

Insurance — Marine — Freight — Restraint of princes — Civil war — Frustration clause — Time clause — Loading of cargo prevented by government forces during civil war — Abandonment of voyage — Justification—Charter in substitution for original charter—Quantum of loss.

By a policy of marine insurance, in the standard form of Lloyd's policy, the plaintiffs were insured in respect of freight on their vessel against loss caused, inter alia, by restraint of princes, civil war and warlike operations. The policy was warranted free of claims based on (a) "loss of, or frustration of, any voyage or "adventure caused by" restraints of princes, and (b) loss proximately caused by delay, the policy incorporating the clauses known as "the Institute Time Clauses—Freight."

At the material time there was a state of civil war in China between the Chinese Communists and the then Chinese Government. The plaintiffs by a charterparty undertook to carry a cargo of salt from a Chinese port in territory under Communist control to Japan, freight to be paid on signing bills of lading. While waiting outside the port to load the cargo, the master was twice in the course of August 8, 1949, warned by naval forces of the then Chinese Government to leave the port, and, after witnessing warlike operations, he left and did not return. After reporting the events to the plaintiffs' agents, he carried out their instructions to proceed to British Columbia under another charterparty and load another cargo, in respect of which freight was later paid to the plaintiffs. The plaintiffs brought an action against an underwriter for an indemnity for loss of freight caused by one of the perils insured against.

Sellers J. held that, although the act of the master in leaving the Chinese port was not voluntary, so far as the claim was based on loss of the voyage caused by restraint of princes, the frustration clause exempted the insurers from liability, but that it did not exempt them from a claim based on civil war; that so far as the policy gave separate cover for loss of freight caused by civil war, the time clauses defeated the claim; and that accordingly the underwriters were not liable under the policy. On appeal:—

Held, that, even if the plaintiffs were justified in making no further attempt to perform the charter, their claim was covered by the frustration clause which relieved the underwriters from liability for loss of any adventure caused by restraint of princes, although the restraint arose from civil war.

Cory v. *Burr* (1883) 8 App.Cas. 393 considered.

Per Morris L.J. (Jenkins L.J. dissenting and Evershed M.R. dubitante): The owners were in all the circumstances entitled to conclude immediately after August 8 that they could not carry out the charterparty: *Andrew Millar & Co. Ld.* v. *Taylor & Co. Ld.* [1916] 1 K.B. 402; 32 T.L.R. 161 and *Bank Line Ld.* v. *Arthur Capel & Co. Ld.* [1919] A.C. 435; 35 T.L.R. 150 considered.

The questions whether, (1) if the frustration clause had not applied to defeat the plaintiffs' claim, the Institute Time Clauses —Freight would have barred the claim, and (2) what would have been the quantum of the loss if the plaintiffs had established their claim, considered but not decided.

Bensaude v. *Thames and Mersey Marine Insurance Co. Ld.* [1897] A.C. 609; 13 T.L.R. 501 and *Russian Bank for Foreign Trade* v. *Excess Insurance Co. Ld.* [1918] 2 K.B. 123; 34 T.L.R. 383; [1919] 1 K.B. 39; 35 T.L.R. 42 considered.

Decision of Sellers J. [1953] 2 W.L.R. 725; [1953] 1 All E.R. 893 affirmed on different grounds.

Action.

By a Lloyd's policy of marine insurance dated August 29, 1949, subscribed to, among others, by the defendant, an underwriter at Lloyd's, the plaintiffs, Atlantic Maritime Co. Inc., shipowners of Panama, were insured for three calendar months from July 15, 1949. The policy, in the standard form, covered against loss of the hull, machinery, etc., as well as of freight. This action was only concerned with loss of freight.

The standard form of policy indicated its general nature by a paragraph which provided: " Touching the adventures and perils " which we the assurers are contented to bear and do take upon " us in this voyage, they are, of the seas, men-of-war, fire, " enemies, pirates, rovers . . . arrests, restraints and detainments " of all kings, princes and people of what nation, condition, or " quality soever." There then followed in italics in the standard form the " free of capture and seizure " warranty, but over that there had been impressed the word " Deleted." The policy incorporated ten addenda. The first of the addenda, which was lettered " A," indicated, first, the period covered by the policy, and second, the " interest insured." That consisted of four heads: first, " hull, materials, machinery, boilers and everything " connected therewith. Valued $624,000." The second, third, and fourth items had figures stated against them, but did not have against them the word " valued." The policy was what was called a valued policy only in respect of the first head, namely, " hull, materials, machinery," etc., with which this case was not directly concerned. The third head or item of interest insured was " freight and/or anticipated freight and/or " chartered freight, $93,600."

The conditions were stated thus: " This insurance is only to "cover risks as per Institute War and Strikes Clauses as "attached. Including war P. and I. etc., liabilities clauses as "attached." Then, after two paragraphs, appeared: "Subject "to War Cancellation Clause as attached"; and finally, "World "wide trading, but warranted not in Black Sea, Baltic Sea (East "of 15 degrees East) or China ports (other than Hong Kong)," etc. The last words were, however, modified by two other of the addenda, lettered "B" and "D," which indicated (in fact, in consideration for a small additional premium) that the policy was to cover the case of the vessel making an in-and-out passage to Taku Bar, near Tientsin.

The addendum lettered "G" was headed "Institute War and "Strikes Clauses. Freight—Time," and was printed. It consisted of five numbered clauses. Clause 1 provided: "This policy "covers: (a) the risks excluded from the standard form of English "Marine Policy by the clause 'warranted free of capture and "'seizure'" paragraphs which appeared in italics in the standard form underneath the word "Deleted." "(b) loss (total or partial) "of the subject-matter hereby insured caused by: (1) hostilities "warlike operations civil war, revolution rebellion insurrection or "civil strife arising therefrom. (2) mines torpedoes bombs or other "engines of war. but excluding loss or damage covered by the "standard form of English Marine Policy with the free of cap-"ture, etc., clause (as quoted in (a)) inserted therein. (c) loss "(total or partial) of the subject-matter hereby insured caused "by:—(1) strikers locked-out workmen or persons taking part "in labour disturbances riots or civil commotions. (2) persons "acting maliciously."

Then followed what was referred to as the "frustration "clause": "Nevertheless this policy is warranted free of any "claim based upon loss of, or frustration of, any voyage or adven-"ture caused by arrests restraints or detainments of kings princes "peoples usurpers or persons attempting to usurp power." Clause 2 "warranted free of loss proximately caused by delay ". . . ." By clause 4: "The Institute Time Clauses—Freight "(except clauses Nos. 9, 12 and 14) are deemed to be incor-"porated in this policy, in so far as they do not conflict with the "provisions of these clauses."

The "Institute Time Clauses—Freight," incorporated in the policy by addendum G, provided by clause 6: "In the event of "the total loss (actual or constructive) of the vessel named here-"in, the amount insured shall be paid in full, whether the vessel "be fully or partly loaded or in ballast, chartered or un-"chartered." By clause 7: "Except in respect of a claim "arising under clause 6, the amount recoverable hereunder for "any claim for loss of freight shall not exceed the gross freight "actually lost. . . ." By clause 8: "Warranted free from any "claim consequent on loss of time whether arising from a peril "of the sea or otherwise."

It appeared from the agreed statement of facts that on the day after the policy operated, namely, on July 16, 1949, the plaintiffs entered into a contract of affreightment or charterparty, in regard to a voyage, to and from Taku Bar. It was a contract whereby the *Atlantic Trader* was to go to Taku Bar, being the port of Tientsin in Northern China, load with a cargo of salt, and take it to a safe port in Japan, which, for the purposes of this case, had been taken to be Moji. One of the addenda added to the charterparty consisted of a printed piece of paper, in the margin of which appeared the words "War Risks Clause"; paragraph 2 thereof provided: "The ship shall have liberty to "comply with any orders or directions as to departure . . . "given by the Government of the nation under whose flag the "vessel sails" (in this case she sailed under the Panamanian flag), "or any department thereof, or by any other Government "or any department thereof or any person acting or purporting "to act with the authority of such government or of any "department thereof."

The *Atlantic Trader* arrived at or off the port of Taku Bar on August 1, and she anchored outside the bar. Taku Bar was at that time under the control of the Communists and their forces. There was, and there had been for a considerable period, a civil war in progress between the Communists and the Nationalist Government of China, which was then the de jure Government of China. The master of the ship, on his arrival, reported his presence in the ordinary course of events and his readiness to load. He received his instructions to load—that was, to start loading—after, in fact, the first of the episodes hereinafter referred to; the instructions being that he should start on August 13, some 12 days after his arrival. He remained, therefore, at anchor off the bar until the morning of August 8. By that time there were near him in the anchorage three other Panamanian vessels and also a fourth vessel, understood to be a Chinese vessel and bearing the letter and number "K.264."

The events which followed were thus stated in the agreed statement of facts. Paragraph 10: ". . . Between 8 and 8.30

"a.m. on August 8, 1949, a destroyer arrived at the anchorage "flying a Chinese flag, though at that time the master did not "know whether it was the flag of the Communist forces or of "the Nationalist. At about 10.30 a.m. on the same day a "Chinese officer and 12 men carrying revolvers and tommy-guns "approached the vessel in a small tug. The officer in charge "asked for the master and on seeing him asked what he was "doing at Taku Bar. The master replied that he was waiting "to load cargo. The officer then asked if there were any "Communists on board and was told there were not. The officer "went to the master's cabin with the master and chief officer "and left two or three of his men outside the cabin door armed "with tommy-guns. He there asked the master a number of "questions as to the vessel and her crew and told him that he "was forbidden to communicate in any way with the shore "whilst the vessel was at Taku Bar. The officer then said to "the master: 'Leave the Northern Chinese ports as soon as "'possible. If any damage happens the Nationalists won't take "'any responsibility.' He then left the vessel and went towards "the other ships in the anchorage. . . ."

Paragraph 12: "After the above conversation with the "Chinese officer the master gave directions for the vessel to be "made ready to sail. Between 3.30 and 4 o'clock that afternoon "the destroyer mentioned above shelled and sank the Chinese "ship number K.264. As none of the other vessels moved away, "the master continued to wait at the anchorage. Just after "4.30 p.m. another destroyer came in from the sea and at "about 5.30 p.m. the master received the following message "from that destroyer, which was transmitted in morse to the "ships in the anchorage. 'Messages to all Panama ships from "'Chinese Navy. Good advice to you. Better leave here "'before 8 p.m. New activity will take place here even if you "'are close to port. Otherwise you are responsible'."

Paragraph 13: "Before 7 p.m. all the lighters and tugboats "in or about the anchorage were collected into one spot by "Chinese naval craft and there anchored. At 7 p.m. that "evening (August 8, 1949) the vessel, together with the three "other Panamanian ships already mentioned, left the anchorage "and sailed out to sea."

Paragraph 14: "At 8 p.m. when the vessel was about five "miles off the Taku Bar lightship those on board saw flashes "and heard explosions from gunfire coming from the direction of "Taku Bar and some days later the wireless operator intercepted "a message stating that another vessel had been sunk within "the harbour at Taku Bar on the night of August 8/9. The "only signs those on board the vessel saw at Taku Bar of cargo "being available was the loading of salt from lighters on the "*San Fernando* and the loading of other cargo on the *Nowrooz*" [two of the three other Panamanian ships]. "The plaintiffs "have no knowledge of the conditions on land which may or "may not have prevented the shippers from bringing up the "cargo for loading the vessel."

Sellers J. admitted evidence of a signal which was not referred to in the agreed statement of facts. It was a signal sent by the master of the *Atlantic Trader* via San Francisco to the owners or their agents, at 12 noon Greenwich mean time on August 8, which said: "Today at 11.30 an officer with 12 armed men from "Nationalist warships boarded my ship. They asked for some "information and they ordered me to abandon immediately the "port and the North China coast. I remained to follow the "developments of the situation for four other vessels at anchor "near my ship. Between 15.30 and 16.00 one of the ships was "fired on and sunk by the warship. At 17.30 we are ordered "again to leave immediately otherwise they are not responsible for "the consequences. All the ships weighed anchor whilst the war-"ships are firing at various targets. I left at 19 o'clock and am "proceeding slow waiting for your orders." It appeared from paragraph 15 of the agreed statement that: "During the night of "August 8/9 the master received an inquiry from the charterer's "agents at Tientsin in the following terms: 'Please advise "'immediately whether you are expecting trouble regarding "'safety. Wahfeng.' On August 9 the master replied to this "inquiry: 'Left Taku Bar 19.00 eighth.' At 8.30 p.m. on "August 9 the master received instructions from the plaintiffs' "London agents to proceed to British Columbia to load a cargo of "lumber after bunkering at Sasebo (Japan)." The ship complied with those instructions arriving, accordingly, at Pacific ports between August 29 and September 30.

The reason why those instructions were given was that on August 9, 1949, the plaintiffs had entered into a second contract of affreightment relating to lumber to be carried from British Columbia to the Atlantic ports. That contract required the *Atlantic Trader* to proceed with all convenient speed to those Pacific ports. By paragraph 23 of that contract it was stated: "Lay-days not to commence before 9 a.m. September 6, 1949, "and if steamer is not in every respect ready to load by noon

"September 14, 1949, charterers to have option of cancelling "this charterparty." The *Atlantic Trader* was able to arrive, and did arrive, at the loading port before the cancelling date. She duly loaded the lumber which she carried to the Atlantic ports.

The court was supplied with a table, extracted from the records of Lloyd's, of the movements of other vessels which were able to go to Taku Bar after the date of those episodes on August 8, both in August and later, and there load cargo of various kinds. None of those other vessels was a Panamanian vessel. All but four of them were, in fact, vessels flying the flag of the United States, and they were all, or for the most part, at any rate, not cargo vessels or tramp steamers, but liners calling to take up, among other things, relatively small amounts of cargo the loading of which took a relatively short time.

Neither the master nor the plaintiffs nor anyone on their behalf made any inquiries as to the possibility of the vessel returning to Taku Bar after the events of August 8.

It was assumed that, if the vessel had started loading as instructed on August 13, 1949, she would at the latest have completed discharge of her cargo by about September 8, 1949, and the gross freight payable would have been £12,420. That was the amount which the plaintiffs might be entitled to recover under the policy, the defendant's proportion being £10 8s. 5d.

The plaintiffs claimed in this action that there had been an actual total loss of freight by hostilities and/or warlike operations and/or civil war and/or the consequences of one or more of the foregoing, or alternatively, by one or more of the other perils insured against under the policy.

The defendant claimed that, if there had been a total loss of freight, it was proximately caused by the voluntary act of the master in sailing away from Taku Bar on August 8 and not returning, or by the voluntary act of the plaintiffs or their agents in ordering the vessel to proceed to load lumber in British Columbia. Alternatively, he alleged that the loss, if any, was proximately caused by the loss or frustration of the voyage or adventure caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power; or that it was consequent on the loss of time or delay; and that the policy was warranted free of claims based on loss so caused. Finally, in the alternative, the defendant alleged that if he was under any liability to the plaintiffs for loss of freight, such loss had been adeemed, extinguished or diminished by the freight earned by the loading of lumber in British Columbia, and that the underwriters were entitled to a proportion of the freight so earned.

A. A. Mocatta Q.C. and *C. T. Bailhache* for the plaintiffs.
Sir Robert Aske Q.C. and *Eustace Roskill* for the underwriters.

The following cases were cited in the argument: *Rankin* v. *Potter*[1]; *Pesquerias y Secaderos de Bacalao de Espana S.A.* v. *Beer*[2]; *Liverpool and London War Risks Association Ld.* v. *Ocean Steamship Co. Ld.*[3]; *Rodoconachi* v. *Elliott*[4]; *Nobel's Explosives Co.* v. *Jenkins & Co.*[5]; *The Knight of St. Michael*[6]; *Miller* v. *Law Accident Insurance Co.*[7]; *British and Foreign Marine Insurance Co. Ld.* v. *Samuel Sanday & Co.*[8]; *Associated Oil Carriers Ld.* v. *Union Insurance Society of Canton Ld.*[9]; *Watts, Watts & Co. Ld.* v. *Mitsui & Co. Ld.*[10]; *Becker, Gray & Co.* v. *London Assurance Corporation*[11]; *Papadimitriou* v. *Henderson*[12]; *Leyland Shipping Co. Ld.* v. *Norwich Union Fire Insurance Society*[13]; *Cory* v. *Burr*[14]; *Turnbull, Martin & Co.* v. *Hull Underwriters' Association*[15]; *Russian Bank for Foreign Trade* v. *Excess Insurance Co. Ld.*[16]; *Carras* v. *London and Scottish Assurance Corporation Ld.*[17]; *Robertson* v. *Petros M. Nomikos Ld.*[18]; *British Movietonews Ld.* v. *London and District Cinemas Ld.*[19]; *Kulukundis* v. *Norwich Union Fire Insurance Society*[20]; *Attorney-General* v. *Ard Coasters Ld.*; *Liverpool and London War Risks Insurance Association Ld.* v. *Marine Underwriters of S.S. Richard de Larrinaga*[21]; *Rickards* v. *Forestal*

---

[1] (1873) L.R. 6 H.L. 83.
[2] [1949] W.N. 189; [1949] 1 All E.R. 845n.
[3] [1948] A.C. 243; 63 T.L.R. 594; [1947] 2 All E.R. 586.
[4] (1874) L.R. 9 C.P. 518.
[5] [1896] 2 Q.B. 326; 12 T.L.R. 522.
[6] [1898] P. 30; 14 T.L.R. 191.
[7] [1903] 1 K.B. 712; 19 T.L.R. 331.
[8] [1916] 1 A.C. 650; 32 T.L.R. 266.
[9] [1917] 2 K.B. 184; 33 T.L.R. 327.
[10] [1917] A.C. 227; 33 T.L.R. 262.
[11] [1918] A.C. 101; 34 T.L.R. 36.
[12] (1939) 55 T.L.R. 1035; [1939] 3 All E.R. 908; 45 Com.Cas. 29.
[13] [1918] A.C. 350; 34 T.L.R. 221.
[14] (1883) 8 App.Cas. 393.
[15] [1900] 2 Q.B. 402; 16 T.L.R. 359.
[16] [1918] 2 K.B. 123; 34 T.L.R. 383; [1919] 1 K.B. 39; 35 T.L.R. 42.
[17] [1936] 1 K.B. 291; 52 T.L.R. 123.
[18] [1939] A.C. 371; 55 T.L.R. 779; [1939] 2 All E.R. 723.
[19] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.
[20] [1937] 1 K.B. 1; 52 T.L.R. 591; [1936] 2 All E.R. 242.
[21] [1921] 2 A.C. 141; 37 T.L.R. 692.

Land, Timber and Railways Co. Ld.[22]; *Bank Line Ld.* v. *Arthur Capel & Co. Ld.*[23]; *W. J. Tatem Ld.* v. *Gamboa*[24]; *Andrew Millar & Co. Ld.* v. *Taylor & Co. Ld.*[25]; *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.*[26]; *Ralli Bros.* v. *Compania Naviera Sota y Aznar*[27]; *Davidson* v. *Willasey*[28]; *Vrondissis* v. *Stevens*[29]; *Bensaude* v. *Thames and Mersey Marine Insurance Co. Ld.*[30]; *Everth* v. *Smith.*[31]

1953. March 16. Sellers J. This action came before the court on an agreed statement of facts, which statement I incorporate into this judgment without repeating it. No witnesses were called at the trial to amplify that which the parties agreed, and the only additional evidence adduced was the translation of a telegram dated August 8, 1949, from the master of the *Atlantic Trader* to his owners' agents in London. The court has therefore to arrive at a decision on what happened at Taku Bar and the effect of it on this evidence alone.

The issues between the parties on the events at Taku Bar are that the claimants, the shipowners, say that their vessel, the *Atlantic Trader*, was obliged to leave Taku Bar and so failed to load the cargo and perform the voyage which would have earned the freight the loss of which is now claimed under the policy of insurance, whereas the defendant, as a representative underwriter, alleges that the sailing away from the port on August 8 was a voluntary act of the master, or, if that was not a voluntary act, it was so to leave the port permanently and not return and take up the cargo, and that it was a voluntary act of the shipowners or their agents to send the ship on another engagement.

In considering these issues I was invited by counsel for the defendant to have regard to what happened after the *Atlantic Trader* left Taku Bar as showing what the probabilities really were, and in support of the submission he quoted the observation of Lord Sumner in *Bank Line Ld.* v. *Arthur Capel & Co.*[1]: "What happens afterwards may assist in showing what the

---

[22] [1942] A.C. 50; 57 T.L.R. 672; [1941] 3 All E.R. 62.

[23] [1919] A.C. 435; 35 T.L.R. 150.

[24] [1939] 1 K.B. 132; [1938] 3 All E.R. 135.

[25] [1916] 1 K.B. 402; 32 T.L.R. 161.

[26] [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[27] [1920] 2 K.B. 287; 36 T.L.R. 456 (sub nom. *Sota and Aznar* v. *Ralli Bros.*).

[28] (1813) 1 M. & S. 313.

[29] [1940] 2 K.B. 90; 56 T.L.R. 713; [1940] 3 All E.R. 74.

[30] [1897] A.C. 609; 13 T.L.R. 501.

[31] (1814) 2 M. & S. 278.

[1] [1919] A.C. 435, 454.

1953

ATLANTIC MARITIME CO. INC. *v.* GIBBON.

Sellers J.

"probabilities really were, if they had been reasonably fore-"casted." Particulars have been furnished of vessels which called at Taku Bar after August 8. The *Iran Victory* arrived on August 10, 1949, loaded just over 1,000 tons and left the next day. She was a liner, and so were most, if not all, of the other ships which loaded there in the ensuing weeks, and none were from Panama.

On this evidence I do not feel able to say affirmatively what the fate of the *Atlantic Trader* would have been if her master had decided to ignore the orders or warnings he had received and had either remained where he was or had temporarily moved away and returned in a day or two. But even if I could, I find it extremely difficult to apply Lord Sumner's dictum. I have to consider the situation as it confronted the master on the information which he had and which he had to assess or, in the military term, appreciate. Unless what happened afterwards could have been reasonably foreseen, any knowledge of after events or any inference to be drawn from them cannot, as I see it, be attributable to the master.

If a master acts on a mere, or even a reasonable, apprehension (though justified) of danger or loss he is acting voluntarily: *Watts, Watts & Co. Ld.* v. *Mitsui & Co. Ld.*[2]; *Becker, Gray & Co.* v. *London Assurance Corporation.*[3] But if he acts when a danger is upon him, when there is an existing and present peril, then he need not wait until force has been used before his act may be held to be an involuntary one, *Rodoconachi* v. *Elliott*[4] and *Nobel's Explosives Co.* v. *Jenkins & Co.*[5]; and I will quote from *British and Foreign Marine Insurance Co. Ld.* v. *Samuel Sanday & Co.*,[6] where Lord Wrenbury said[7]: "Restraint "is equally imposed when obedience is given by reason of the "existence of force in reserve as when it is given by reason of "force employed." And both sides relied on the statement of Earl Loreburn[8]: "I am not pressed by the circumstance that "force was neither exerted nor present, for force is in reserve "behind every State command. And it would be a strange law "which deprived the assured, if otherwise entitled to his "indemnity, upon the ground that he had not resisted, till the "hand of power was laid upon him, an order which it was his "duty to obey. If it were an order which he was not bound to

---

[2] [1917] A.C. 227.

[3] [1918] A.C. 101.

[4] (1874) L.R. 9 C.P. 518.

[5] [1896] 2 Q.B. 326.

[6] [1916] 1 A.C. 650.

[7] Ibid. 672.

[8] Ibid. 659.

"obey, and which he might have successfully resisted either by "violence or by process of law, a question might arise whether "or not there had been in fact a restraint."

Lord Dunedin put the question thus in *Watts, Watts & Co. Ld.* v. *Mitsui & Co. Ld.*[9]: "Restraint of princes, to fall within "the words of the exception, must be an existing fact and not a "mere apprehension . . . it may be possible to invoke the exception when a reasonable man in face of an existing restraint may "consider that the restraint, though it does not affect him at the "moment, will do so if he continue the adventure. It would be "useless to try to fix by definition the precise imminence of peril "which would make the restraint a present fact as contrasted "with a future fear. The circumstances in each particular case "must be considered." That was a charterparty case and not one of insurance, but the observations apply equally, I think, to the one as to the other.

The agreed facts show that there was civil war in Taku Bar and the neighbourhood. The port and its hinterland were in the hands of, and under the control of, the Chinese Communist forces, and obviously active trading was taking place. The destroyer which arrived early on August 8, 1949, was flying the Chinese flag and was acting on behalf of the then Government of China, the so-called Nationalist Government, with which the Communists were at war. The boarding party which the destroyer put on board the *Atlantic Trader* carried revolvers and tommy guns. Later in the day another Nationalist Government destroyer arrived at the port. During the afternoon and later in the evening there was gunfire, and it appears that more than one vessel was sunk in the harbour. The master's telegram stated that at 11.30 a.m. the boarding party ordered him to abandon immediately both the port and the North China coast. At 5.30 p.m. he was again ordered to leave immediately, otherwise the warships would not be responsible for the consequences. The master had been forbidden to communicate in any way with the shore whilst his ship was at Taku Bar, and two at least of the other vessels in the harbour were compelled by threats from the warships to leave the port and were warned not to return; and they did not return.

The master of the *Atlantic Trader* had remained throughout the day to await developments, notwithstanding the early order to leave, and I find that he left under compulsion and that the action he took was in no way a voluntary act. It may be that he was not infringing any rule of law. The *Atlantic Trader* was a neutral vessel and was not engaged in anything contrary to the rights of a neutral vessel; but I do not think that the situation was such that he could safely stand on his legal rights. The threat of force was there. It was being exercised against some ships in the harbour. It was in the interest of both the owners and the insurers that the vessel should not be unduly hazarded to a loss by gunfire or arrest, and the master would have been blamed for reckless disregard of the safety of his ship if he had become a casualty in either of these ways after the two warnings which had been given and in the conditions which he had himself observed during the day.

---

[9] [1917] A.C. 227, 238.

I find that the *Atlantic Trader* left Taku Bar on the evening of August 8, 1949, because of the civil war which was taking place there, because of the restraint placed on her by the Chinese Government forces, who restrained her master from communicating with the shore and from remaining in the harbour, and because of warlike operations. The same facts and circumstances seem to me to establish the three separate risks of civil war, restraint, and warlike operations. In the light of the known circumstances, I do not think that a prudent master could have ignored the warnings and the happenings which he himself saw. It would seem that it was not only Taku Bar but the northern Chinese ports which the master had to leave, and he had no reason to think that the risks were slight or the interference was only temporary. In those circumstances I find against the defendant's submission that the act of the master at any material stage was voluntary.

The *Atlantic Trader* had arrived at Taku Bar on August 1, and had given the necessary five days' notice of the steamer's readiness to load, and the lay days started to run at 8 a.m. on August 8. The probabilities were that, but for the events which happened that day, the *Atlantic Trader* would in due course have loaded the cargo of salt at Taku Bar in accordance with the charterparty of July 16, 1949, and would have been paid the freight thereon which was to be paid in cash in sterling in London "on signing bills of lading, discountless, not returnable ship "and/or cargo lost or not lost." In the events which happened that freight was not received, and it is for the gross amount which would have been payable under the charterparty that the claimants seek to be indemnified under the policy of insurance with the defendant and others.

The policy is a combined policy covering four separate heads of cover, of which the third and only relevant one in this action is: "Freight and/or anticipated freight and/or chartered freight "$93,600 at ·125 per cent." The traditional Lloyd's form of policy has been subject to some deletions and the whole policy is made up of no less than 10 separate documents attached to and incorporated in the policy. The relevant parts of the policy are set out in the agreed statement of facts.

As Lord Wright pointed out in *Rickards* v. *Forestal Land, Timber and Railways Co. Ld.*,[10] the words "capture seizure arrest "restraint or detainment" were intended to repeal the words printed in the body of the policy—"enemies, . . . takings at "sea, arrests, restraints and detainments of all kings, princes "and people." Lord Wright added "it is also clear that it is "this peril or class of perils which is dealt with in the frustration "clause," by which name is described the clause, "Warranted "free of any claim based upon loss of, or frustration of, the "insured voyage or adventure caused by arrests restraints or "detainments of kings princes peoples usurpers or persons "attempting to usurp power."

I have found that the *Atlantic Trader* was prevented from remaining at, or entering into shore communication with, Taku Bar by reason of civil war and restraint of princes (warlike operations includes civil war and adds nothing in the circumstances of this claim), and that thereby she was prevented from loading the cargo agreed and earning the freight thereon. On these findings the claimants ask to be indemnified under the policy. This claim is resisted by the underwriters on two grounds: the first, that the proximate cause of the loss of the freight was the loss of the adventure, and they rely on the frustration clause; the second, that the policy was "warranted "free of loss proximately caused by delay," that it was subject to clause 8 of the Institute Time Clauses, and that it was delay which caused the loss of the freight here.

The decision on the matter turns on the proper interpretation of the contract of insurance, which interpretation has to be in the light of established principles in relation to this particular type of contract and with regard to the decisions on its interpretation as far as they are applicable. A large number of cases were cited in argument, not all of which were cases of freight insurance or of insurance at all, and many of which I do not find it helpful to review in this judgment, although they may contain decisions or observations which are a guide.

---

[10] [1942] A.C. 50, 78.

Freight insurance entered into on the old form of marine insurance policy, with deletions and additions to adapt the form to the intended contract, has almost invariably given rise to difficulties of interpretation, and I do not regard this case as one of the exceptions. What the claimants have lost is the money which would have been paid over to them under the terms of the charterparty when the cargo was loaded at Taku Bar, and this did not take place because of the action taken by the Nationalist Government's naval forces on August 8. Therefore it would seem that the loss of freight was caused by that action.

But the frustration clause exempts the insurers from liability if the claim is based on loss of or frustration of any voyage caused by restraint of princes. The voyage which would have earned the freight, a voyage which had already begun and in respect of which the lay days had started to run, was lost by the restraint of princes, and, in my opinion, in so far as the claim has to be made on the restraint of princes peril, the underwriters are not liable.

It was argued that the claim was not based on the loss or frustration of the voyage or adventure but on the peril or perils incurred, and that this was so even though the voyage or adventure was in fact lost or frustrated. There has been divergence of opinion on the effect of the words "based upon," but it does not seem to me that any special effect can be given to them which would, in its effect, express this clause more favourably for the claimants. The question is: can this freight be regarded as lost by the restraint of princes proximately causing its loss, the loss arising eo instanti, to quote Lord Wright in one of the cases, or must it be held to be lost by the failure of the voyage or adventure, which failure was in my finding caused by the restraint or civil war?

In *Carras* v. *London and Scottish Assurance Corporation Ld.* Lord Wright defined freight insurance as follows [11]: "What is "insured under the freight policy is not a chattel like a ship or a "cargo; it is, even in the case of chartered freight, as in the "present case, which is the most definite type of insurable "interest in freight, merely a chose in action, a right of earning "freight under the charter; a fortiori where there is merely an "expectancy of earning freight, though enough to constitute an "insurable interest." Greene L.J. likewise said that in a freight policy,[12] "the subject matter of the insurance is a chose in "action—viz., the contractual right to receive the freight from the "charterer under the charterparty." And he continued: "If "that right is lost through a peril of the sea the underwriters are "liable as on a total loss." That would be so here, I think, substituting the insured peril of restraint of princes for a peril of the sea, were it not for the exceptions of the frustration clause and the clauses relating to delay.

---

[11] [1936] 1 K.B. 291, 304.

I will add the citation from Cleasby B. in *Potter* v. *Rankin*[13] quoted in Arnould on Marine Insurance, 13th ed., p. 1058: "It "is not, as is usually the case, an interest in anything which "exists and of which possession can be had, as, for instance, a "ship, or cargo, or even freight of cargo on board, of which the "lien on the cargo gives a qualified possession: but, in such a "case of chartered freight as the present, the interest is only a "right to have cargo provided; it can only be enforced by "action; and is in the nature of a chose in action." In so far as there is any difference in definition or approach between the earlier and the later statements I accept the later, but for the purposes of this case I doubt if there is any material difference.

In the light of this approach the present case is quite distinct from the cases which have arisen for consideration, or any case, where there has been a loss of the ship or cargo, actual or constructive, as for instance in *Robertson* v. *Petros M. Nomikos Ld.*[14] Here all that was lost was the voyage or the adventure and thereby the freight to be earned thereunder. The ship was sound and free and was not only an unfettered vehicle capable of earning freight but, in fact, with the minimum of delay she sailed away to perform another engagement and earned freight under another charterparty.

Whatever the original purpose of the clause may have been, in my opinion it effectively exempts the underwriters from liability in a case such as the present in so far as the claim is made for a loss of freight caused by restraint of princes; or, put in the other way, by reason of the clause the shipowners have not covered themselves for a loss of freight by restraint incurred in the way in which it has arisen here.

If it is said that at first sight the policy does not make this entirely clear to the insured, I would readily agree. At a glance the policy appears to give with one hand and take away with the other that which it has given. But where parties agree a policy which first strikes out and then restores that which has been erased, there seems to be no reason in contract why the policy cannot repeat such methods, and a rule of construction which would give effect to a substantive obligation and not permit it to be nullified by an exception would not appear to be applicable. In any event, the freight insurance clauses in the policy give a wide cover and the restrictive clauses dealing with frustration and delay do not nullify the cover but only qualify or limit its incidence.

---

[12] [1936] 1 K.B. 315.

[13] (1870) L.R. 5 C.P. 341, 354–5.

[14] [1939] A.C. 371.

The charterparty of July 16, 1949, contained a war-risk clause, and apparently the charterers accepted its non-fulfilment without complaint and without any claim for damages for its breach against the shipowners. It was argued that in these circumstances the charterparty was not strictly or technically frustrated, but that it terminated by reason of its own express terms. It is sufficient for me to hold, as I have done, that the voyage was lost, without considering further this doubtful submission that the charterparty was not frustrated.

The frustration clause is, however, limited to loss or frustration of a voyage or adventure caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp powers. Any one of these three types of interference may arise, I apprehend, without civil war, and the policy gives a separate cover for loss of freight caused by civil war. It has been agreed that civil war was in progress, and the incidents of August 8, as far as they affected the *Atlantic Trader*, were the consequences of civil war.

The claimants are entitled, as I see it, to base their claim on this separate head of cover to which the frustration clause does not apply, and were it not for the other two clauses relied on by the underwriters, I would be prepared to construe the policy (certainly by application of the contra proferentes rule) in their favour on the facts established here. But the policy is also "warranted free of loss proximately caused by delay," and by clause 8 of the Institute Time Clauses, "Warranted free from "any claim consequent upon loss of time whether arising from "a peril of the sea or otherwise."

Since the *Atlantic Trader* retained her full carrying powers as a ship if and when the civil war ended, or if and when its effect no longer affected the loading of vessels at Taku Bar, the *Atlantic Trader* could have returned and loaded the cargo of salt under the charterparty in question. The voyage under the charterparty was lost, and thereby the freight to be earned thereunder by reason of the delay involved. It was because the cargo could not be loaded and the contractual voyage could not be performed within any foreseeable or assessable period of time that the master abandoned the contract and sailed away and the owners entered into a new engagement for her services.

If the right view is that the voyage, notwithstanding the events of August 8, could have been performed within a reasonable time or, more accurately, within a time which the charterparty (having regard to all its terms) must be held to have contemplated as the period for its fulfilment, then the freight would have to be held to have been lost by the voluntary act of the claimants or their servants and there could be no claim for indemnity under the policy.

In my opinion this case is covered by the authority of *Bensaude* v. *Thames and Mersey Marine Insurance Co.*[15] In that case the vessel's main shaft broke through a peril of the sea and the vessel returned to her port of loading. The delays necessary for taking the vessel to Cadiz and repairing the damage were such as to frustrate the objects of the adventure, and the charterers lawfully put an end to the contract. Lord Halsbury L.C. said[16]: "The reason why the loss of freight had been "incurred must be that the damage was of such a character "that there was an impossibility of prosecuting the voyage "within the time within which it was necessary to prosecute it." Lord Watson put it succinctly[17]: "but for the delay occasioned "by the breaking of the shaft there would have been no loss to "claim."

In *Robertson* v. *Petros M. Nomikos Ld.*[18] the *Bensaude* case[19] was distinguished, and Lord Atkin made these observations[20]: "I wish, however, to reserve the question whether the "claim in this case was in any view consequent on loss of time. "The question appears to me to be in every case a question of "fact, and the authorities should be treated from that point of "view. It may prove that the words 'consequent on loss of "'time' have received too wide a construction in some of the "cases."

No judicial pronouncement of Lord Atkin should go unheeded, but notwithstanding his warning, and dealing with the question as one of fact, I find in this case as I have already indicated, and it follows that the time clauses would defeat the claim based on restraint of princes in the absence of the frustration clause. If the clauses do not apply here where an unladen vessel waiting to load is not lost, not damaged, not arrested, and not detained, but is sound and free and merely held up at the time from performing her contractual obligations, I find it difficult to give any real effect to the two clauses on which the underwriters rely.

---

[15] [1897] A.C. 609.

[16] Ibid. 611.

[17] Ibid. 613.

[18] [1939] A.C. 371.

[19] [1897] A.C. 609.

[20] [1939] A.C. 371, 377.

In my opinion the claim for indemnity fails, and there will be judgment for the defendant with costs.

M. M. H.

The plaintiffs appealed.

A. A. Mocatta Q.C. and *C. T. Bailhache* for the plaintiffs. The first contention is that the judge was right in holding that the master acted under compulsion on August 8 and that the contract of charterparty was then frustrated. The material time for deciding whether the contract was frustrated was when the ship had to leave Taku Bar. If then a reasonable man would have thought that it was not possible to fulfil the contract, although he is ultimately found to have been wrong and in fact the contract could have been subsequently performed, that will not affect the frustration. The principle as to frustration is stated in *British Movietonews Ld.* v. *London and District Cinemas Ld.*[1] and *W. J. Tatem Ld.* v. *Gamboa.*[2]

Assuming that the voyage was frustrated, the plaintiffs are entitled to recover. Clause 8 of the Institute Time Clauses—Freight, which provides that the policy "is warranted free from "any claim consequent on loss of time," has no application. This is not a loss "proximately" caused by delay within clause 8; that clause has often caused difficulty, but it would be straining the language to make it apply to this case. Here the freight was lost when the ship was compelled to leave Taku Bar on August 8, and no question of time enters into it. It became impossible to perform the charterparty on that date. Clause 8 is a common form and was designed to meet the type of situation considered in *Jackson* v. *Union Marine Insurance Co. Ld.*[3] In that case damage to a ship caused by her running aground took so long a time to repair that the charterers threw up the charter, and it was held that the chartered freight was lost by a peril of the sea.

---

[1] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[2] [1939] 1 K.B. 132; [1938] 3 All E.R. 135.

[3] (1874) L.R. 10 C.P. 125.

C. A.
1953

ATLANTIC MARITIME CO. INC.
v.
GIBBON.

But if that meaning is not accepted, clause 8 is ambiguous, and an ambiguous exception cannot be relied on to limit liability. This was not in any case a loss fairly consequent on loss of time: see Arnould on Marine Insurance, 13th ed., vol. 2, p. 708. Effect was given to clause 8 in *Bensaude* v. *Thames and Mersey Marine Insurance Co. Ld.*,[4] but that decision has since been criticized. It does not establish any principle applicable here; it was merely an application of clause 8 to a particular set of facts, as in *Turnbull, Martin & Co.* v. *Hull Underwriters' Association Ld.*[5]

It is contended that the decision of Bailhache J. in *Russian Bank for Foreign Trade* v. *Excess Insurance Co. Ld.*[6] was wrong. On appeal[7] the court did not deal with the point. Roche J. in *Roura & Forgas* v. *Townend*[8] distinguished Bailhache J.'s decision in the *Russian Bank* case.[9] *Carras* v. *London and Scottish Assurance Corporation Ld.*[10] and *Robertson* v. *Petros M. Nomikos Ld.*[11] support the plaintiffs' contention.

The next matter to be considered is the measure of damages, which has been called the "quantum point." The plaintiffs contend that they are entitled to recover £12,420, being the gross amount of the freight which was lost under the charterparty in question, because that was in fact the amount of the plaintiffs' loss. Section 70 of the Marine Insurance Act, 1906, deals with the case where there is a partial loss of freight. Where freight is insured, it is the gross freight which is recoverable, not the net profit. When the charterparty was frustrated by the events of August 8, the plaintiffs had to find some employment for the ship. They have not to bring into account the freight which was earned by the second charterparty. [Reference was made to Arnould on Marine Insurance, 13th ed., vol. 2, p. 1058, Chalmer's Marine Insurance Act, 1906, 4th ed., p. 103, and to *Carras* v. *London and Scottish Assurance Corporation Ld.*[12] and *Papadimitriou* v. *Henderson*.[13]]

Sir Robert Aske Q.C., *Eustace Roskill Q.C.* and *A. J. Bateson* for the defendant. The true construction of the frustration clause and of the time clauses in this policy is of great importance to insurers, since every freight insurance on the London Market contains these clauses. It is submitted that this is not a valued policy so far as regards freight. Except in the case of total loss of the vessel, when clause 6 of the Institute Time Clauses applies, the amount recoverable under the policy is limited to the amount actually lost. It is common ground that the plaintiffs' claim is for a total loss of freight in respect of the first charterparty, and clause 7 of the time clauses applies. The court is thus considering a claim for total loss under a voyage charter. In this case it is essential for the assured to prove that the voyage was lost, that the contract of charterparty was frustrated. If the contract remains an effective contract, so that the assured can carry out the contracted voyage and carry the cargo after a lapse of time within the contemplation of the adventure, then there is no loss of freight. In that case, if the freight is not earned, the loss is due to the default of the assured. So long as there is a possibility of earning freight, there cannot be a total loss of freight. If the master abandons the voyage under an option given to him in the charterparty, the loss is due to the election of the master and not to an insured peril. It is only where an insured peril operates to make the voyage impossible that the master can treat the voyage as at an end and the assured can claim for a total loss of freight. The subject-matter of an insurance of freight is the contractual right of the assured to obtain freight from the charter: *Carras* v. *London and Scottish Assurance Corporation Ld.*[14]

---

[4] [1897] A.C. 609; 13 T.L.R. 501.

[5] [1900] 2 Q.B. 402; 16 T.L.R. 359.

[6] [1918] 2 K.B. 123.

[7] [1919] 1 K.B. 39.

[8] [1919] 1 K.B. 189, 196; 35 L.T.R. 88.

[9] [1918] 2 K.B. 123.

[10] [1936] 1 K.B. 291; 52 T.L.R. 123.

[11] [1939] A.C. 371; 55 T.L.R. 779; [1939] 2 All E.R. 723.

[12] [1936] 1 K.B. 291.

[13] (1939) 55 T.L.R. 1035; [1939] 3 All E.R. 908; 45 Com.Cas. 29.

Frustration may take many forms: loss of the ship by sinking or capture, damage to the ship which is irreparable. There may be frustration, although the damage to the ship is slight, if it cannot be repaired so as to enable the adventure to be completed within the time reasonably contemplated by the parties, or if the damage cannot be repaired except at a cost which would exceed the value of the ship. Delay and obstruction do not amount to frustration, unless the delay is likely to be so long that to carry the cargo would be to perform a different adventure: *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.*,[15] *per* Lord Wright. Unless it is expressly otherwise provided, loss of freight only arises where there has been loss of the adventure: *Mercantile Steamship Co. Ld.* v. *Tyser.*[16] *Bank Line Ld.* v. *Arthur Capel & Co.*[17] lays down the principles to be applied in determining whether there has been frustration of the adventure.

---

[14] [1936] 1 K.B. 291.

[15] [1942] A.C. 154, 179; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[16] (1881) 7 Q.B.D. 73.

[17] [1919] A.C. 435.

On the facts of this case, there was no frustration or loss of the voyage. The evidence shows that the events of August 8 were of a temporary nature and that the master could have returned to Taku Bar and loaded the cargo of salt.

Alternatively, if there was frustration, it is submitted that it was due to delay and that the plaintiffs cannot recover having regard to clause 8 of the Institute Time Clauses. The loss here was due to the delay caused by the orders given by the vessels of the Chinese National Government: see *Bensaude* v. *Thames and Mersey Marine Insurance Co. Ld.*[18] Time was an element in causing the frustration of the adventure: *Carras* v. *London and Scottish Assurance Corporation Ld.*[19] The loss here was due to the fact that, owing to the civil war, it was impossible to fulfil the contract within the time contemplated.

The proximate cause of the frustration here was restraint of princes, which is an excepted peril. The civil war was not the cause of the frustration. The war had been going on for some time and did not prevent ships going in and out of Taku Bar and taking up cargo. The frustration was due to the orders given on August 8, which amounted to restraint of princes. Accordingly, the plaintiffs cannot recover: *Cory* v. *Burr.*[20] [*P. Samuel & Co.* v. *Dumas,*[21] *per* Lord Sumner, was also referred to.]

Eustace Roskill Q.C., following. Two questions arise when considering the quantum point. First, are the plaintiffs entitled to make any claim for loss of freight? Secondly, if they have suffered any loss, how much can they recover? This is a contract of indemnity and the plaintiffs cannot recover more than the loss which they have suffered, unless it is otherwise stated in the policy. It is only in the case of the actual or constructive total loss of the vessel that the freight insurance is payable in full. This is a time policy and did not insure this particular voyage. To ascertain the loss which the plaintiffs suffered, it is necessary to see what was carried during the currency of this charter. It is submitted that the plaintiffs recovered by the second charter all that they had lost under the first. At the date of the issue of the writ, when the extent of the loss falls to be determined, the plaintiffs had in fact suffered no loss, or no loss which is recoverable under the policy: *Everth* v. *Smith.*[22] If there was initially a loss under the policy, it was adeemed before the action was brought: see *Roura & Forgas* v. *Townend,*[23] *per* Roche J. The policy did not insure any specific freight. The position must be looked at when the policy expires. If there was a loss of freight, the loss must be assessed in accordance with clauses 6 and 7. Sections 68 and 70 of the Marine Insurance Act, 1906, do not apply here, since the sections are unworkable if applied to a time policy.

---

[18] [1897] A.C. 609.

[19] [1936] 1 K.B. 291.

[20] (1883) 8 App.Cas. 393.

[21] [1924] A.C. 431, 467; 40 T.L.R. 375.

Mocatta Q.C. in reply was asked not to deal with the quantum point unless he could satisfy the court on the frustration point. The rigid test as to the nature of frustration, applicable in the case of contract, is not applicable to a policy of marine insurance. *Mercantile Steamship Co. Ld.* v. *Tyser*[24] is distinguishable from this case. In *Andrew Millar & Co. Ld.* v. *Taylor & Co. Ld.*[25] it was held that an embargo did not frustrate a contract and that the plaintiff should have waited a reasonable time to see if it were lifted before repudiating the contract. That decision has not been followed. It was not followed by Bailhache J. in *Anglo-Northern Trading Co. Ld.* v. *Emlyn Jones and Williams.*[26] Whether the assured should wait to see if in the circumstances the adventure has been frustrated depends on the actual circumstances of the case. Here the master rightly treated the adventure as abandoned. If he had returned to Taku Bar and the ship had been lost, it might have been alleged that he had hazarded the vessel.

The proximate cause of frustration of this adventure was not restraint of princes, an excepted peril, but the civil war. Secondly, if that is wrong and there were two causes of the frustration, the civil war and the restraint of princes acting together, the plaintiffs can claim under the head of civil war. Clause 1 of the Institute War and Strike Clauses, incorporated in the policy, is ambiguous and should be construed against the underwriters. The underwriters insured the plaintiffs against a number of perils; certain of those perils are excepted. If the plaintiffs can bring themselves within one of the other perils they are entitled to succeed. *Cory* v. *Burr*[27] does not cover this case. It was decided on the question of the proximate cause of the loss, which was held to be seizure. In the *Carras* case[28] there was both a commercial loss of freight and a loss of freight by loss of time, which was excluded; nevertheless the assured recovered on the basis of the former. Here the plaintiffs were insured against civil war, and they contend that this adventure was frustrated by the civil war. The activities of the destroyers on August 8 were one activity in that war. This clause was considered by the House of Lords in *Rickards* v. *Forestal Land, Timber and Railways Co. Ld.*,[29] and the plaintiffs' contention is supported by that decision. [Reference was made to *Yorkshire Dale Steamship Co. Ld.* v. *Minister of War Transport.*[30]]

---

[22] (1814) 2 M. & S. 278.
[23] [1919] 1 K.B. 189, 195.
[24] 7 Q.B.D. 73.
[25] [1916] 1 K.B. 402.
[26] [1917] 2 K.B. 78; 34 T.L.R. 27.
[27] 8 App.Cas. 393.
[28] [1936] 1 K.B. 291.

The time clause does not defeat the plaintiffs' claim. Bailhache J. in *Russian Bank for Foreign Trade* v. *Excess Insurance Co. Ld.*[31] was wrong in his conclusion on the time clause. Lord Porter, in *Robertson* v. *Petros M. Nomikos Ld.*,[32] did not approve that decision of Bailhache J.

EVERSHED M.R. This was an action by shipowners to recover for loss of freight on a Lloyd's policy of marine insurance. The freight alleged to have been lost was an amount of freight, approximately £12,000, payable in respect of a contract of affreightment whereby the plaintiffs' ship, the *Atlantic Trader*, was to load at the port of Taku Bar in Northern China a cargo of salt and carry it to Moji, in Japan. The defendant is one of the underwriters of the policy, and has been selected in accordance with common practice for the purposes of the suit, the actual sum claimed to be due from him being £10 8s. 5d. There is no dispute, so far, as to the figures. The defences to the action may be taken to be four in number—First, it is denied that the plaintiffs have proved that their alleged loss of freight was due to any of the perils covered by the policy, apart from any of the exceptions contained in it. The second and third defences are to the effect that, if the loss were otherwise covered by the policy, the underwriters are absolved by one or other of the exceptions in the policy, particularly what has been referred to as the frustration clause and certain time clauses. Lastly, it is said that, upon the facts of the case, there was, in any event, no loss at all or, at least, that the sum claimed should be substantially reduced, having regard to the fact that another freight was earned after the date of the alleged loss.

---

[29] [1942] A.C. 50; 57 T.L.R. 672; [1941] 3 All E.R. 62.

[30] [1942] A.C. 691; 58 T.L.R. 263; [1942] 2 All E.R. 6.

[31] [1918] 2 K.B. 123.

[32] [1939] A.C. 371.

The judge found for the defendant and dismissed the action with costs. He found in the plaintiffs' favour on the first of the defences which I have indicated, but held that the case fell within one of the exceptions to which I have alluded. He did not deal with the fourth defence, which has been referred to before us as the quantum point. Let me say at once that I agree with the judge that this claim fails, though I prefer to base myself on a different exception, namely, the frustration clause, from that which appealed to the judge. I prefer to express no concluded view on the other exception clauses or upon the quantum point. It is right to say that we have not heard full argument upon these matters.

The questions involved are all of them, except the last, questions solely of the construction of the particular policy with which we are concerned. The policy is in a form which, I gather, is common in cases of this kind; that is to say, it is based upon what is called the standard form of Lloyd's policy, to which numerous slips, ten in all, have been added, so that little, indeed, is left of the original foundation. I do not repeat the observations of MacKinnon L.J. in the Court of the Appeal in *Forestal Land, Timber and Railways Co. Ld.* v. *Rickards*,[1] in regard to this form of policy. I have no doubt that those engaged in this class of business find it convenient that their policies should take this form. But it cannot, I think, be denied that the effect produced is in some degree one of taking away with one hand what has been given with the other, and the task of the courts in construing the resultant document or documents is certainly rendered more difficult. The very numerous cases to which we have been referred make it not, indeed, easy to contend that those entering into this class of business well understand the meaning of the conventional accumulation of clauses which constitute the policy. It is, however, here a question of the interpretation of this particular congeries of documents, and that interpretation must be made in the light of such cases as have established or illustrated the principles which have to be applied.

There was no oral evidence taken before the judge. An agreed statement of facts was produced, on the basis of which, together with one or two relatively unsubstantial additions, the whole matter was tried. [His Lordship read the relevant provisions of the policy.] The policy, by virtue of addenda made to it, covered risks incurred during the voyage to and from the port of Taku Bar.

---

[1] [1941] 1 K.B. 225, 247; 57 T.L.R. 139; [1940] 4 All E.R. 395.

It is also to be noted that, so far as the freight is covered, it appears not to be a valued policy. The policy, however, covers a period of time of 92 days, and during that time covers the assured against loss of freight, whether chartered, unchartered, or anticipated: that is to say, this is not a policy covering loss of some freight under a particular contract of affreightment. It covers any loss of freight from an insured peril (subject, of course, to the exceptions) incurred during the period of 92 days which the policy covers.

His Lordship then stated the facts and continued: the first question which arises is, putting it as the judge put it, did the master of the *Atlantic Trader* act voluntarily in leaving, as he did, the port of Taku Bar and sailing away towards Japan, or did he act under compulsion, that is to say, as a result of restraint of princes, being one of the insured perils? The judge answered that question in favour of the plaintiffs. He was of opinion that there was, on August 8, as a consequence of and illustrated by the episodes related in the agreed statement of facts, a peril actually present which amounted to a restraint of princes or an episode in the civil war, such as justified him or the owners in abandoning the first contract of affreightment. Those events caused the master, as the judge said, to treat the adventure comprehended in the charterparty as lost, and the judge thought that the master was justified in abandoning that contract and that freight then and there. That the judge so stated his conclusion is apparent from one passage in his judgment where he said [2]: "It was because the cargo could not be loaded and the "contractual voyage could not be performed within any foresee-"able or assessable period of time that the master abandoned the "contract and sailed away and the owners entered into a new "engagement for her services." I think that statement is not quite accurate, and Mr. Mocatta, indeed, so conceded. In light of the signal sent by the master on August 8 and the reply instructing him to proceed to the British Columbian ports, it is not accurate to say that the master had abandoned the contract for good and all when he sailed away from Taku Bar on the evening of the 8th. He sailed away and proceeded at slow speed awaiting orders, and the actual abandonment was determined upon by the owners on the following day, August 9.

So far as the law applicable to this aspect of the case is concerned, there has, I think, been no question in this court that it was rightly stated by the judge in the course of his judgment. Without taking undue time upon it, I will refer to a passage from Lord Dunedin's speech in *Watts, Watts & Co. Ld.* v. *Mitsui & Co. Ld.*,[3] which the judge cited. In that case the restraint of princes was an exception to the policy, and the quotation must, of course, be read accordingly, but that is not material to the present matter. "Restraint of princes," said Lord Dunedin, "to fall "within the words of the exception, must be an existing fact and "not a mere apprehension. This was held long ago by Lord Ellen"borough in *Atkinson* v. *Ritchie*.[4] The more recent cases cited "by the appellants, such as *Geipel*[5] and *Nobel's Explosives*,[6] do "not in any way touch that proposition. They only show that "it may be possible to invoke the exception when a reasonable "man in face of an existing restraint may consider that the "restraint, though it does not affect him at the moment, will "do so if he continue the adventure. It would be useless to try "to fix by definition the precise imminence of peril which would "make the restraint a present fact as contrasted with a future "fear. The circumstances in each particular case must be "considered." As regards subsequent events, the judge referred to what Lord Sumner said in the well-known case of *Bank Line Ld.* v. *Arthur Capel & Co.*[7] "What happens after"wards may assist in showing what the probabilities really "were, if they had been reasonably forecasted."

---

[2] Ante, 104.

We were also referred to a passage in Sir Arnold McNair's book on the Legal Effects of War, 3rd ed., p. 165, which, in my judgment, correctly states the problem which is posed in these cases, and I respectfully adopt it as part of my judgment. "It is submitted," says the writer, "that the test can be stated "as follows: Would a reasonable man in the position of the "party alleging frustration, after taking all reasonable steps to "ascertain the facts then available, and without snapping at the "opportunity of extricating himself from the contract, come to "the conclusion that the interruption was of such a character "and was likely to last so long that the subsequent performance "or further performance of the contract would really amount to "the performance of a new contract?"

I would like to make only one further citation from the judge's judgment, where, after stating that no doubt the *Atlantic*

---

[3] [1917] A.C. 227, 238; 33 T.L.R. 262.

[4] (1809) 10 East 530.

[5] (1872) L.R. 7 Q.B. 404.

[6] [1896] 2 Q.B. 326; 12 T.L.R. 522.

[7] [1919] A.C. 435, 454; 35 T.L.R. 150.

Trader was not infringing any rule of law but was a neutral vessel, and observing then that a reference to books on International Law was hardly appropriate in the presence of 13 men armed with tommy-guns and revolvers, he stated[8]: "It was in "the interest of both the owners and the insurers that the vessel "should not be unduly hazarded to a loss by gunfire or arrest, "and the master would have been blamed for reckless disregard "of the safety of his ship if he had become a casualty in either "of these ways after the two warnings which had been given "and in the conditions which he had himself observed during "the day."

Before leaving the cases on this aspect of the matter, I should refer to *Andrew Millar & Co. Ld.* v. *Taylor & Co. Ld.*,[9] decided in this court. That was a case in which at the outbreak of the first World War the British Government had imposed an embargo on the export of confectionery and an owner, treating that embargo as likely to be of indefinite duration, then claimed that he was justified in abandoning or treating as lost his contract of affreightment. The court, however, held that the owner had acted with undue precipitation, that the nature of the embargo on or prohibition of the export of confectionery was not, in the circumstances, one which was likely to last indefinitely or for a long time: and the court was no doubt assisted to that conclusion by the circumstance that it was, in fact, very shortly afterwards lifted and removed. It was contended by Mr. Mocatta that that case should be regarded as special, and he indicated reasons for saying that it had not been generally regarded with favour. It is, of course, an authority binding on this court; but I think that the only conclusion that one can draw from that and other cases is that stated in that last sentence from Lord Dunedin's speech, namely, that you must pay regard in each case to the particular circumstances of that case. There may be circumstances in which the nature of the embargo is such that a reasonable man ought not to regard it as likely to be of long or indefinite duration. But, plainly, it is equally true that a case such as *Andrew Millar & Co. Ld.* v. *Taylor & Co. Ld.*[9] cannot be regarded as an authority which would compel persons in the position of masters of ships or shipowners to wait at sea for long periods of time (highly inconvenient in ordinary business relations) when the nature of the restraint or arrest was such that a reasonable man, according to commonsense standards, would and should take it as concluding any possibility then and there of further performance of the contract of affreightment.

---

[8] Ante, 99.

[9] [1916] 1 K.B. 402; 32 T.L.R. 161.

Again, I gratefully refer to a passage in Sir Arnold McNair's book, The Legal Effect of War, 3rd ed., p. 163, where, after mentioning the *Andrew Millar* case [9] and what he calls the "rule" that emerges from it, he says: "This rule does not touch the case "where the operative cause is so conclusive as to discharge the "contract at once, for in such a case it would be unreasonable "to demand delay." In the present case I have no doubt that the action of the master of the *Atlantic Trader* in moving out of the harbourage at Taku Bar at 5 o'clock in the evening of August 8, 1949, was an act of his not voluntary but under compulsion: that is to say, it was an act which could be classified as being due to restraint of princes.

But that is not necessarily the conclusion of this part of the case, for the question is: have the plaintiffs proved that the peril was such—the circumstances were such—on August 8 or 9 (or both), 1949, as justified the master as a reasonable man, or the plaintiffs as reasonable men, in concluding that the adventure—that is, the Taku Bar salt contract of affreightment—was lost then and there? In other words, was the master justified, or were the plaintiffs justified, in making no further attempt (as they did not) and no further inquiry after the evening of August 8 with a view to seeing if that contract of affreightment could still be achieved?

In answering or attempting to answer that question, it is necessary to bear in mind certain obvious facts: first, that the date when loading was to begin was still some way ahead—August 13; second, that the civil war in that part of China had been going on for some considerable time, and during that period of time ships like the *Atlantic Trader* had been trading regularly in this part of the world. What was novel in the situation, so far as the evidence shows, was the arrival in the harbourage of these two Chinese destroyers. The later facts, namely, the circumstance that other ships apparently were thereafter able to go in and load (though relatively small) quantities of cargo, is relevant (as Lord Sumner has said) only as showing what the real possibilities, correctly forecasted, were on August 8 and 9. How should a man in the master's position then have judged the situation? It has been for me a somewhat difficult part of the case that the judge seems to have thought that the master on the evening of August 8 regarded the situation as so tense and threatening and the peril as so actual that he then and there abandoned the contract. The fact is somewhat different.

---

[9] [1916] 1 K.B. 402.

Perhaps unfortunately, no evidence was taken or heard from the master, which would throw further light on his appreciation of the situation and would enable the court to judge whether that appreciation was the appreciation of a reasonable man. The question is one of inference from the facts comprehended in the agreed statement, together with the cable. Do they favour the view that there was here a peril of such a nature as justified immediate abandonment?

Mr. Mocatta tabulated certain matters for our consideration. First is the fact that the master, at the least, was justified on the evening of August 8 in moving out of the immediate neighbourhood; second is the fact that the Panamanian ships (and the second message was addressed to them, for by that time apart from the destroyers they were the only ships remaining there) were told not merely to go from Taku Bar but to leave all the northern Chinese ports; third is the fact that all three ships, in addition to the *Atlantic Trader*, went with the *Atlantic Trader* and that, so far as the evidence shows, none of them ever returned. Further, there is the point that no complaint was ever made (so far as the evidence goes) by the charterers of the conduct of the *Atlantic Trader* in declining to attempt any further performance of the charterparty. As regards that matter, however, it is noteworthy that the charterparty contained a clause giving to the ship (on the face of it) liberty to comply with any orders as to departure given by any department of any government, and it may be that, for that reason, the charterers could not have complained because the master of the *Atlantic Trader* did obey what purported to be an order given by an officer on behalf of the Nationalist Government of China. Then Mr. Mocatta asked: what would have happened to the *Atlantic Trader* if she had been observed by the Chinese warships hanging about outside the harbour of Taku Bar, either disregarding or attempting to disregard their orders against communication with the shore?

Those are, and would provide for anybody in the position of the master, somewhat formidable considerations favouring an immediate and final departure from the scene of turbulence. There are, however, other considerations which seem to me to weigh somewhat in the other direction. The civil war had been going on for some time, and trading in those ports had not apparently been much interfered with by reason of it. Five days still remained before loading was to begin. There is also the circumstance that anybody well acquainted with the sea would wonder how long two destroyers could in any circumstances remain at sea in the absence of any tanker or other vessel capable of supplying them. Last, and perhaps most important of all, it is necessary, I think, clearly to have in mind the nature of the threat or minatory advice given by the Chinese officer and men. There was no suggestion, so far as I can see, that the Nationalist ships were forbidding the Panamanian ships to load cargo which was not material of war or were threatening any harm directly to those ships. Put quite broadly, what I understand the Chinese warships were saying was this: "There is going to be trouble "in this water and if you are still present you may get hurt; "if you do, we cannot help it." It is not, after all, an uncommon state of affairs. One can well imagine on land a situation in which a party of men about to make some sort of raid upon a rival party might say to innocent third persons: "You had better "get out of the way; there is going to be trouble and, if you "remain here, we cannot be responsible if something happens to "hit you."

Bearing, then, all these considerations in mind, I confess that I feel some doubt whether upon this major premise of the whole case the plaintiffs have proved their claim. The matter is obviously difficult, and I acknowledge the experience in these matters of the judge who tried the case and expressed the contrary view. In those circumstances, I do not propose to express, and do not think it necessary that I should express, any final view upon this matter. If the adventure was lost, whether strictly the contract of affreightment was frustrated, by which I mean "frustrated" according to our law of contract—if the view taken by the master and the owners was justified, then the circumstances were such as had the equivalent effect and the adventure was lost—then the freight it would earn would have been lost also. But in my judgment, as I have earlier indicated, if the adventure was so lost, and was lost by reason of this interference by the warships, then I have come to the conclusion that the underwriters are absolved from liability by the frustration clause in the policy. I repeat its terms: "Nevertheless this "policy is warranted free of any claim based upon loss of . . . "any voyage or adventure caused by . . . restraints of princes," etc. I think, according to the plain sense of the language and the plain sense of the facts, it was on this hypothesis so lost, and the case falls within, and exactly within, the ordinary meaning of that paragraph.

Upon this matter, however, the judge took a different view. He said that the adventure was lost (and he put it alternatively) either as a result of civil war or as a result of restraint of princes or as a result of hostile operations. "I find," he said,[10] "that "the *Atlantic Trader* left Taku Bar on the evening of August 8, "1949, because of the civil war which was taking place there, "because of the restraint placed upon her by the Chinese Government forces, who restrained her master from communicating "with the shore and from remaining in the harbour, and because "of warlike operations." The judge having stated the matter thus and invoked all three of those reasons, Mr. Mocatta accordingly says: "I can now base my claim against the under-"writers exclusively upon the civil war as the reason for the "loss and so bring myself outside the terms of the restraint "which, though mentioning 'restraint of princes,' etc., does "not in terms refer to civil war." Alternatively, as I understand him, Mr. Mocatta has argued that, reading the restraint clause with the rest of the policy or of the particular addendum of which it forms part, the frustration clause must be taken to liberate the underwriters from liability for loss caused by restraint of princes, provided that the restraint of princes is not itself an incident of civil war—an argument, of course, which must carry Mr. Mocatta necessarily this further distance, that the restraint of princes must be a restraint unconnected with any of the other matters specifically set out in addendum "G"—"hostilities, warlike operations, mines, torpedoes," and so on.

I am bound to say that, if the latter contention is right, it seems to me to give to the frustration clause a wholly artificial and unnatural restriction in meaning. My own view, and I state it at once, is that, on the facts as I have stated them and on the assumption I have made in the plaintiff's favour, the real, efficient or (if you will) "proximate" cause of the loss was the restraint of princes. It is true that the restraint arose out of, was an incident of, a civil war, but the civil war per se (which had gone on a long time) was not responsible for the loss. To establish the claim and to state its nature with sufficient particularity, it seems to me that the plaintiffs were bound to allege and to rely on the particular circumstances narrated in the agreed statement of facts, which, though an incident of the civil war, constituted a restraint of princes.

---

[10] Ante, 99.

In the course of the argument I put an example to Mr. Mocatta of this character. Let it be supposed that an owner is insured against loss from warlike operations generally, and that there is then an exception "warranted free from any loss caused "by torpedoes." Mr. Mocatta, as I understand it, conceded (and I think he had to concede on his argument) that, if his ship was sunk by a torpedo fired in the course of the warlike operation, he could still base his claim on warlike operations and ignore the torpedo exception, or, alternatively, could contend that the exception as to torpedoes related only to torpedoes fired otherwise than in the course of warlike operations—that is to say, during the course of peace-time practice or by accident.

If, then, I am right in saying that the real, efficient cause of this loss was the restraint of princes, I have already said that it seems to me clearly, as a matter of language, covered by the frustration exception. It is to be noted, as Sir Robert Aske pointed out, that the exception is limited in this way: it is applicable on the face of it only to cases where the claim is based on loss or frustration of a voyage or adventure, which I take to be in distinction from those cases where the vessel or the cargo is itself lost. However that may be, if I am right so far, it seems to me inevitable that this case is covered by the reasoning of the case in the House of Lords of *Cory* v. *Burr.*[11] The facts of that case, shortly, were these: The master of the ship having committed an act of barratry, the ship was in consequence arrested by the Spanish revenue authorities. The policy covered acts of barratry by the master, but contained an exception, a frustration clause substantially the same as that with which we are concerned. The House of Lords, affirming the Court of Appeal, held (and held quite clearly, because they did not find it necessary to call upon the respondent) that though in a sense everything flowed from the act of barratry (and, as Lord Blackburn pointed out, a case might have been made based in origin on the barratry), upon a proper analysis of the matter the true cause of the loss, the efficient cause, or (again I use the expression which is found in the Marine Insurance Act, 1906) the proximate cause, was the seizure, and it was impossible for the plaintiffs to make good their claim, unless they pleaded and alleged the seizure. Put another way, the barratry itself, though it started the train of events which ended in the loss, did not necessarily involve the loss, because non constat that any action of restraint would be taken by those entitled to take it. Mr. Mocatta, who analysed the speeches of the noble Lords in that case, said, as I understood him, that it established only that in that case seizure was the proximate cause; so that it did not stand in his way if he could, apart from the restraint of princes, base his claim, as he said the judge by his judgment found he was entitled to do, upon civil war without reference to the restraint. But it seems to me that, on the facts of this case, it is inescapable that the real, efficient cause of this loss was the restraint of princes and not the civil war.

---

[11] (1883) 8 App.Cas. 393.

I do not propose to go through the speeches in *Cory* v. *Burr*,[11] but I cannot accept the view (if Mr. Mocatta so contended) that their reasoning involved the proposition that the barratry could be disregarded altogether. It seems to me that, to take one instance, Lord Selborne L.C. clearly in his opinion negatived such a conclusion. He said[12]: "But then it is contended that, "though there was a capture or seizure, and though the capture "or seizure only caused the loss, and there would have been no "loss without the capture or seizure, yet that if a claim might "be made upon the footing of barratry, then the warranty does "not apply. I confess I have never seen how such a construction "could be put upon the policy and the warranty, taken together, "without leading to consequences altogether destructive of the "whole operation of the warranty. Suppose the case of a "belligerent capture: that belligerent capture is as much attribu-"table to 'men-of-war,' or to 'enemies,' to 'taking at sea,' as "any seizure by reason of barratry can be attributed to barratry "—indeed more directly and immediately. Men-of-war and "enemies might or might not have taken the ship, but their "coming into contact with the ship, their firing at her, their "placing her in a position of jeopardy, is the first step towards "'capture or seizure' which is its consequence. Then the argu-"ment, if it is sound as to barratry, would seem to be sound as "to 'men-of-war' and 'enemies' also, that because there is an "express insurance against those things, therefore a 'capture or "'seizure,' and consequently an attack by 'men-of-war' or by "'enemies,' is to be taken out of the warranty." I do not propose to read the rest of it, though Mr. Mocatta relied particularly on the last sentence: "That appears to me to be equally the "case whether remotely it was occasioned by barratry or not."

---

[11] (1883) 8 App.Cas. 393.

[12] Ibid. 397.

The Lord Chancellor was, as I understand it, making the point that to say that seizure was the real cause of the loss was not to deny responsibility in the barratry. So here, putting it the other way round, though it is true that all that followed arose from the civil war, the civil war alone, or the mere allegation of the civil war, could not suffice to make good the claim: the plaintiffs must allege those further acts which, being restraint of princes, are to my mind clearly within, as I venture to think, the plain language of the frustration warranty.

Mr. Mocatta further contended, however, that the view for which he argued (namely, that he could base his case exclusively on the civil war risk and disregard the restraint of princes) was supported by the way in which *Carras* v. *London and Scottish Assurance Corporation Ld.*[13] went in this court. In my judgment the *Carras* case[13] is essentially different from the present. In that case the ship in question suffered from a severe storm, a peril of the sea, in the Magellan Straits, the damage done to her being such that it was impossible to salve her save by an expenditure of money which would exceed in amount the actual value of the ship when repaired. In the circumstances, the ship was abandoned to the hull underwriters and eventually passed to the salvors. The freight to be earned by the voyage on which she was then engaged was lost. It was said that, in so far as that loss of the venture was attributable to the delay, the loss of time which followed the disaster before the ship was finally repaired (as it eventually was), the claim would be barred by the time clause; but the plaintiffs in that case, through Sir Robert Aske, said: "We are not claiming that we lost this voyage through "any delay. The time had nothing to do with it. What (we "say) lost us the freight was the circumstance that commercially "it was uneconomic to repair the vessel. That is how we base "our claim. There was here only one peril, the sea peril, which "caused the disaster, and we can and do base our case on that "peril without any reference to loss of time." That the court held they were entitled to do. The case is, therefore, I think, wholly distinct from the present, where the question may be put in one of two ways: first, are there here two perils and, if so, can the plaintiffs choose between one and the other?, to which the answer, as I have already indicated, is: "No; both must "be proved, or at least the peril of the restraint"; alternatively, (though this is perhaps putting the same point in another way), it is not possible for the plaintiffs to put their case save by alleging and proving the particular restraint which is covered, as I think, by the frustration clause.

---

[13] [1936] 1 K.B. 291; 52 T.L.R. 123.

Having stated that conclusion it is, of course, the end of this appeal; but, as I have already indicated, Sellers J. preferred to base his rejection of the plaintiffs' claim upon the time clauses and to say that the underwriters were absolved by their operation. So saying, he dealt, somewhat briefly, with the point which I have thought the most significant and upon which I have preferred to base my own judgment, though he clearly indicated that upon that point he was, contrary to my opinion, in the plaintiffs' favour. I have already said that the problem to which the time exceptions give rise has not been fully argued before us, but the clauses seem to me, I confess, to raise points of great difficulty, and, having regard to the view which Sellers J. expressed and to the argument which we have heard, I think it right that I should make some observations upon them.

There are here two clauses, but for present purposes (though I am not to be taken as denying possible distinctions between them) I will confine myself to paragraph 8 of the "Institute Time "Clauses—Freight": "Warranted free from any claim conse-"quent on loss of time whether arising from a peril of the sea "or otherwise." If the matter were wholly free from authority, I confess at once that I should think that this time clause had, in the present circumstances, nothing to do with the case; and that I apprehend was the view of Bailhache J. when he came to consider a similar situation in the *Russian Bank for Foreign Trade* v. *Excess Insurance Co. Ld.*[14] But the question now is whether, particularly having regard to the decision which Bailhache J. eventually reached in that case, the authorities, as they now stand, do not inevitably produce the result that, on this ground also, the plaintiffs fail; and since it was obviously not possible for Sellers J. to attempt to overrule the view expressed by Bailhache J., it is perhaps natural that he should have based his conclusion upon the time clauses. It is open to this court, if it thought right, to express disapproval of the decision in the *Russian Bank* case.[14]

The cases are not numerous, and begin with *Bensaude* v. *Thames and Mersey Marine Insurance Co. Ld.*[15] in the House of Lords. That case is well known; its facts were briefly these: the ship in question, through a peril of the sea, broke her shaft.

---

[14] [1918] 2 K.B. 123; 34 T.L.R. 383.

[15] [1897] A.C. 609; 13 T.L.R. 501.

She was engaged, or about to be engaged, in conveying Portuguese troops and arms to a destination. The breaking of the shaft took some time to repair—so long a time that the Portuguese charterers (as they were entitled to do by Portuguese law) cancelled the charter and so the freight was lost. It was contended that, since the breaking of the shaft was due to an insured peril, the plaintiffs were entitled to recover. The answer was: No; the loss was due essentially not to the breaking of the shaft but to the delay which followed the breaking; as a result of which, by Portuguese law, the charterers were entitled to be released from their contract.

I think it useful to refer to the first two sentences of the argument in the report which, to my mind, make clear the real point of the decision [16]: "The appellants lost their claim for "freight owing to the breaking of the shaft, that is, owing to "the perils of the sea." So far, that is right, if by it is meant that all that was material followed from—flowed from—the breaking of the shaft. Then the second sentence is: "The claim "is consequent, not upon the loss of time, but upon the dis-"abling of the vessel by perils of the sea, and arose at once "before any loss of time had taken place." It was that sentence —that part of the argument—which the House rejected, observing that the loss did not arise at once upon the happening of the accident, but only upon, and as a consequence of, the delay which the break occasioned. As Lord Halsbury L.C. put it [17]: "The "reason why there was loss of freight was that the repairs "would have taken so long a time as would have defeated the "adventure."; or, as put in the passage most often quoted, from Lord Herschell's speech [18]: "The whole basis of the claim of "course must be the loss of the subject-matter insured—that is, "the freight. That loss must arise from one of the perils "insured against. What is the meaning of saying that the "underwriter is not to be liable for any claim consequent upon "loss of time? It must mean that although the subject-matter "insured has been lost, and although it has been lost by a peril "insured against, if the claim depends on loss of time in the "prosecution of the voyage so that"—which I read as meaning "in the sense that"—"the adventure cannot be completed "within the time contemplated, then the underwriter is to be "exempt from liability."

[16] [1897] A.C. 609, 610.

[17] Ibid. 611.

[18] Ibid. 613.

The next case cited, *Turnbull, Martin & Co.* v. *Hull Underwriters' Association Ld.*,[19] to which I do not propose to make any detailed reference, was in essentials similar. There a fire (which was an insured peril) occurred and damaged the refrigerating plant in the ship. The ship was engaged in carrying meat from an Australian port and, as a result, the bargain was lost; and the reason why it was lost was this: that the repair of the refrigerating machinery took so long a time that, putting it quite broadly, the meat could not wait; it would have to go and find another ship.

Then comes the third case, Bailhache J.'s case of *Russian Bank for Foreign Trade* v. *Excess Insurance Co. Ld.*[20] So far as relevant, the facts of that case were that a ship was engaged to sail from Novorossisk, in the Black Sea, to Falmouth. While she was at Novorossisk the Turkish State entered the first World War against this country and Russia, and the Dardanelles, the exit from the Black Sea, were accordingly closed. Having regard to the nature of those circumstances, namely, the consequences of a declaration of war, it followed that the closure was of so long a time or of so indefinite a duration that the restraint, which the declaration of war involved, was treated as being conclusive, finally making impossible then and there the sailing of the ship to Falmouth. That being the case, Bailhache J. said this[21]: "The defendants have two answers to this. First, they refer "to the written clause in the policy reading 'Excluding all "'claims due to delay,' and they say the claim based upon the "closing of the Dardanelles is a claim due to delay. I must "deal with this answer a little closely, because I confess that I "thought during the argument there was very little in the point. "I have since read the decision of the House of Lords in "*Bensaude* v. *Thames and Mersey Insurance Co. Ld.*[22] two or "three times, and I am now satisfied that the point is one that "deserves very careful consideration." The judge then referred to the exact terms of the policy and to the facts of the *Bensaude* case[22] and he continued[23]: "I confess I cannot distinguish the "two cases. In the *Bensaude* case[24] there was a peril insured "against, namely, of the sea—the propeller shaft broke. Here "there was a peril insured against, namely, restraint of princes "—the Dardanelles were closed. In the *Bensaude* case[24] the

---

[19] [1900] 2 Q.B. 402; 16 T.L.R. 359.

[20] [1918] 2 K.B. 123.

[21] Ibid. 127.

[22] [1897] A.C. 609.

[23] [1918] 2 K.B. 123, 128.

[24] [1897] A.C. 609.

"broken propeller shaft necessitated such delay in the prosecution of the voyage that the adventure was frustrated. Here "the restraint of princes did the same thing. In both cases it "was delay due to a peril insured against, which caused in one "case the total loss of the freight, and in the other the constructive total loss of the cargo. The fact that the subject-matter "insured was in the one case freight and in the other case barley "seems to me immaterial." The judge was, therefore, saying that in principle the two cases were indistinguishable: that the logic of the *Bensaude* case[24] governed the *Russian Bank* case.[25]

Before I make my own observations, it is convenient first to mention the other relevant cases. In *Roura & Forgas* v. *Townend*[26] the ship, which was carrying a cargo of coal, was seized by the Germans, and its subsequent fate was that it was abandoned or stranded in Denmark and thereafter recovered; but in the circumstances the judge held that the ship must be treated constructively as a total loss, and for that reason he distinguished the case from the *Russian Bank* case.[27] I hope that I am saying nothing that I should not say, if I add that I read the passage at the end of Roche J.'s judgment as indicating some doubt in his mind of his acceptance of Bailhache J.'s reasoning. "There remains," he said,[28] "the defence based upon the fact "that claims arising from delay were excluded by the express "terms of the policy. It was said that it was the lapse of the "time during which the *Igotz Mendi* was in German hands that "caused the loss, and that such lapse of time was delay within "the meaning of the exception. The reasoning of Bailhache J. "in *Russian Bank for Foreign Trade* v. *Excess Insurance Co.* "*Ld.*[29] was relied upon in support of this part of the defendants' "case. The decision of Bailhache J. in that case has, I understand, been affirmed by the Court of Appeal on a ground having "no bearing on the present case. I understand that the Court "of Appeal did not consider, or at any rate express any opinion, "as to whether they adhered to the view of Bailhache J. upon this "point of the delay clause. It is certainly, therefore, undesirable and, in my view, also unnecessary that I should express "any opinion on that matter." In Roche J.'s case the ship was treated as totally lost.

In a still later case in the House of Lords, *Robertson* v.

---

[24] [1897] A.C. 609.
[25] [1918] 2 K.B. 123.
[26] [1919] 1 K.B. 189; 35 T.L.R. 88.
[27] [1918] 2 K.B. 123.
[28] [1919] 1 K.B. 189, 196.
[29] [1918] 2 K.B. 123.

Petros M. Nomikos Ld.,[30] which again was a case of total loss, two of the noble lords expressed some doubt as to the scope of the *Bensaude*[31] decision and, as I take it, the validity of Bailhache J.'s application of the *Bensaude*[31] decision; for Lord Atkin said[32]: "I wish, however, to reserve the question whether "the claim in this case was in any view consequent on loss of "time. The question appears to me to be in every case a "question of fact, and the authorities should be treated from "that point of view. It may prove that the words 'consequent "'on loss of time' have received too wide a construction in "some of the cases, and I only desire to register a caution that "it must not be assumed from the decision in this case that the "loss of freight in question was in fact in consequence of loss "of time." Lord Thankerton associated himself with Lord Atkin's caution.

On the other hand, no doubt treating the *Russian Bank* case[33] as a good authority and in part relying on that authority, Porter J. in the *Carras* case[34] was able to make this formulation: "What, then, constitutes a total loss or constructive total loss "of freight? It may, in my view, be due to three causes: (1) "loss of ship, total loss or constructive total loss; (2) loss of "cargo, total loss or constructive total loss; and (3) loss of the "adventure. Loss of the adventure, however, is a claim consequent on loss of time and is, by clause 7 of the Institute "Clauses, irrecoverable."

In terms the *Russian Bank* case[35] was not, in fact, there mentioned.

I do not think that there is any real, sound or justifiable basis for distinguishing, on the facts, the present case from the *Russian Bank* case.[35] It seems to me that to attempt such a distinction would be to introduce into a subject, already complex enough, fine distinctions which would only add to confusion and doubt. On the other hand, to my mind there are formidable arguments advanced by Mr. Mocatta for saying that in principle and logic the *Russian Bank* case[35] is essentially different from the *Bensaude* case,[36] and for this reason: in the *Bensaude* case[36] and cases of that kind the peril—the accident, if you will—is complete and distinct from the period of time which thereupon ensues. These are cases, observe, in which the ship or the cargo is physically damaged. The shaft is broken: that of itself does not give rise to any claim, since it may be capable of being repaired the next morning; but it is then followed by a definite, ascertained loss of time, and it is that loss of time, distinct from though consequent upon the accident itself, which gives rise to the loss of the bargain.

---

[30] [1939] A.C. 371; 55 T.L.R. 779; [1939] 2 All E.R. 723.

[31] [1897] A.C. 609.

[32] [1939] A.C. 371, 377.

[33] [1918] 2 K.B. 123.

[34] (1935) 52 Ll.L.Rep. 34, 39.

[35] [1918] 2 K.B. 123.

[36] [1897] A.C. 609.

In a case such as the *Russian Bank* case,[37] and in this case, it seems to me that the time element is relevant, not as a consequence of the mishap, but to ascertain correctly the nature and quality of the accident. If, because of the length of time which is likely to subsist during which the peril lasts, it is justifiable to say "This finally disposes of the bargain," then the freight is lost then and there immediately upon the happening of the insured peril and is attributable solely to that peril. The time element has only been essential in order to estimate correctly the extent of the peril; and if, in point of fact, the peril ceased a week or two weeks afterwards, that fact would be quite immaterial, provided that the original decision was held, in the circumstances, to have been reasonably justified. That seems to me a real and sensible, even if it be thought to be a fine, distinction between the two classes of case. In *Petros M. Nomikos Ld.* v. *Robertson*,[38] when in the Court of Appeal (I have already referred to it in the House of Lords), MacKinnon L.J. used language which seems to me to be characteristically happy. In reference to the time clause he said[39]: "It"—that is, the exception—"will bar any claim whenever it is necessary for the "assured to assert the lapse of time as one of the facts estab- "lishing his cause of action." That is, the actual lapse of time as it in fact occurs.

But in a case such as the present, the lapse of time is not actual but estimated and has gone to make up and establish, as I have said, the nature and quality of the risk. If that is so, then it certainly leads to what to my mind is the comforting conclusion that a case such as this and the *Russian Bank* case[40] would be treated as outside the contemplation of the time clause; for I am comforted by Bailhache J.'s view that, on a reading of the clause as a matter of English, that is undoubtedly one's first impression. But, in the circumstances of this case, it is not necessary for me to express a final view; and having regard to the length of time for which the decision of Bailhache J. has stood without adverse comment or criticism—except so far as it can be found in Roche J.'s case and the cautions of Lord Atkin and Lord Thankerton—I am not prepared to say, and I do not think it would be right for me to say, that Bailhache J. was wrong. And if he was not wrong, then I have already stated that, in my judgment, his decision covers the present case. But I venture to express the hope that if this case, or another similar case, should go to the House of Lords, it may then be thought appropriate for the House to review (as, after all, it best can) the scope of its own decision in the *Bensaude* case[41] and the formulation of Lord Porter (as a judge of first instance) in the *Carras* case.[42]

---

[37] [1918] 2 K.B. 123.

[38] [1938] 2 K.B. 603; 54 T.L.R. 882; [1938] 3 All E.R. 249.

[39] [1938] 2 K.B. 603, 628.

[40] [1918] 2 K.B. 123.

The House may also then consider to what extent the principle of another case also cited, *Mercantile Steamship Co. Ld.* v. *Tyser*[43] (not, in fact, cited in the *Bensaude* case[44]) may not also be relevant. In that case, owing to peril and a consequent lapse of time, a charterer became entitled by his contract to cancel, and he did cancel; and the Court of Appeal held that the loss was caused, not by the peril or the length of time, but by the exercise by the charterer of his contractual right. It might have been said that what lost the freight contract in the *Bensaude* case[44] was not the peril nor the length of time but the Portuguese law which justified the charterer in cancelling the contract. These, however, are matters appropriate for the House to consider should this case or another case find its way to the House.

There remains only what I have called the quantum point. As I have already said, following Sellers J.'s judgment, I think it unnecessary to express any concluded view and I propose to say very little upon it. I think that the question in this case largely depends, as the other questions have done entirely, on the terms of the policy itself, rather than upon sections 68 and 70 of the Marine Insurance Act, 1906. The point, however, may be simply stated, and is this: if the second, or British Columbia, charter was made in substitution for the first, or salt charter, in the sense that it would not have been made, and could not have been made and carried out, had the first charter not been lost, then, subject to any question of figures, prima facie, it would appear to me that the plaintiffs suffered no loss at all. If, on the other hand, the second charter or some other similar charter could have been made, and reasonably might have been expected to have been made, notwithstanding the performance of the first charter, then, having regard to the terms of the policy, it seems to me that the plaintiffs would be entitled, if they were in other respects right, to say: "We have lost this "particular £12,000 and it is nihil ad rem that after the time of "its performance had gone by we may or could have anticipated "some other freight." My difficulty is that there is no evidence at all before the court of the circumstances in which, in fact, the second or British Columbia charter was made, nor any evidence upon which a decision might be reached on the likelihood or possibility, given performance of the first charter, of making, within such time as was left, another bargain of affreightment. In the absence of that evidence, it is additionally fortunate, to my mind, that I do not find it necessary to express any concluded view. But I am bound to say that, on the facts as they emerge from the agreed statement, there seem at least strong grounds for supposing that, in truth, the British Columbia charter —the making of which caused the decision of the owners communicated to the master on August 9—was in substitution for the first charter and would not have been made (so that its freight would not have been earned) had it not been for the loss or abandonment of the first charter. Subject, as I say, to any question of figures, since the British Columbia charter appears to have produced more for the owners than the first charter, the result would appear, prima facie, to be that there was, in any case, no loss.

---

[41] [1897] A.C. 609.

[42] [1936] 1 K.B. 291.

[43] (1881) 7 Q.B.D. 73.

[44] [1897] A.C. 609.

For the reasons which I have stated, and particularly my conclusion upon the frustration point, I think that the judge below correctly dismissed the action, and I would dismiss the appeal.

JENKINS L.J. I agree that this appeal fails. It is common ground that the plaintiffs, on or about August 8, 1949, abandoned the voyage contemplated by the charterparty of July 16, 1949, and, accordingly, lost the freight payable under that charterparty, in the sense that they failed to earn it. But, to succeed, the plaintiffs must further show that their abandonment of the voyage, with the consequent loss of freight, was brought about, not by their own election, but by some peril insured against, which made the performance of the voyage for practical purposes impossible and, in effect, left them no option but to abandon it.

The intervention of the Chinese Nationalist destroyers on August 8, 1949, was clearly a peril insured against, and, accordingly, any loss of freight demonstrably brought about by such intervention would constitute a valid claim under the policy, unless barred by one or other of the exceptions contained in it. But did such intervention make the performance of the voyage for practical purposes impossible? To secure an affirmative answer to this question, the plaintiffs need not go so far as to establish that in the light of subsequent events it would, in fact, have been impossible to perform the voyage by reason of the peril in question: it would suffice for them to satisfy the court that the circumstances, as known at the time of abandoning the voyage, were, upon reasonable assessment, such as to warrant the inference that performance of the voyage had become, for practical purposes, impossible by reason of the peril in question. See the speech of Lord Sumner in *Bank Line Ld.* v. *Arthur Capel & Co.*,[45] where he said: "The question must be considered "at the trial as it had to be considered by the parties, when "they came to know of the cause and the probabilities of "the delay and had to decide what to do. On this the judg- "ments in the above cases substantially agree. Rights ought "not to be left in suspense or to hang on the chances of sub- "sequent events. The contract binds or it does not bind, and "the law ought to be that the parties can gather their fate then "and there. What happens afterwards may assist in showing "what the probabilities really were, if they had been reasonably "forecasted, but when the causes of frustration have operated so "long or under such circumstances as to raise a presumption of "inordinate delay, the time has arrived at which the fate of the "contract falls to be decided. That fate is dissolution or continu- "ance and, if the charter ought to be held to be dissolved, it "cannot be revived without a new contract. The parties are "free."

Nevertheless, if those circumstances were not, upon reasonable assessment, sufficient to warrant that inference, it does become material to consider whether the peril in question did, in fact, make the voyage for practical purposes impossible and, if it is not shown to have done so, the plaintiffs cannot succeed merely on the strength of an unwarranted inference of impossibility drawn at the time of abandonment. I would add that, as appears from my use of the expression "for practical purposes "impossible," absolute impossibility, inferential or actual, need not be made out. Prevention of performance for such a period, or save at such risk, as to make performance in a business or commercial sense impracticable, would suffice.

---

[45] [1919] A.C. 435, 454, 455.

These considerations lead me to formulate the primary question in the case as follows: did the intervention of the Chinese Nationalist destroyers on August 8, 1949, and the directions then given by their commanders, warrant the inference that the *Atlantic Trader* would, for some unpredictable but probably substantial period of time thereafter—for example, for the duration of the civil war,—be unable to load the required cargo of salt at Taku Bar without serious risk of attack, sinking or seizure at the hands of the Nationalist naval forces? In answering this question, it has to be borne in mind that the date appointed for the commencement of loading the vessel was August 13, 1949, and that there is evidence to the effect that on and after August 10 a number of vessels loaded cargo at Taku Bar apparently without molestation. This, so far as it goes, suggests that the impediment brought about by the intervention of the Nationalist destroyers was, in fact, of a purely transient and temporary character. That does not in itself conclude the question against the plaintiffs, as the reasonable inference from the circumstances, as they appeared on August 8, 1949, might nevertheless have been that the impediment was of a permanent character (for example, that the Nationalists had resolved to institute a blockade of Taku Bar for the duration of the civil war) and, as I have already indicated, the matter must primarily be judged by reference to the circumstances as then known.

But were those circumstances, duly considered and assessed at that date, such as to warrant that inference? Speaking for myself, I cannot see that they were. The civil war had been in progress for a long time before August 8, 1949, and it does not appear that there had been any previous molestation by the Nationalists of neutral ships trading to and from Taku Bar. The directions given by the Nationalist naval forces, as recorded in the agreed statement of facts, seem to me on the whole to suggest a temporary warning-off of neutral vessels for their own safety pending particular operations against the Communists in the course of which they might be accidentally damaged, rather than an announcement of something in the nature of a permanent blockade. At best, they were of doubtful import, and, while clearly necessitating a temporary withdrawal on the part of the *Atlantic Trader*, I do not think that they warranted the immediate conclusion that it would be impracticable for the *Atlantic Trader* to load salt at Taku Bar on August 13, 1949, or within any reasonable period of time thereafter. The matter standing in this state of uncertainty as regards the Nationalists' intentions, I think that it behoved the plaintiffs to wait, at all events for a few days, to see how the situation developed. If they had done so, there is nothing in the evidence to suggest that the vessel could not have loaded in safety at Taku Bar, commencing on the date actually appointed, that is to say, August 13, 1949. On the contrary, the evidence as to the activities of other merchant vessels at Taku Bar on and after August 10 suggests, so far as it goes, that the vessel could, in fact, have so loaded.

Accordingly, in the view which I take the plaintiffs have failed to show that the circumstances as known on August 8, 1949, were such as to warrant the inference that performance of the voyage had been rendered for practical purposes impossible by the peril in question. Still less have they shown that performance of the voyage would, in fact, have been impossible, the evidence as to the subsequent shipping activities at Taku Bar, so far as it goes, being to the opposite effect. I therefore conclude, differing in this respect from the judge, that the plaintiffs' case fails on the ground that the facts fall far short of establishing that their abandonment of the voyage, with the consequent loss of freight, was brought about by the intervention of the Nationalist destroyers in the sense above indicated, as distinct from being the product of their own election.

My conclusion on this aspect of the case is, I think, supported by the reasoning in *Andrew Millar & Co. Ld.* v. *Taylor & Co. Ld.*[46] and by the following passages from Sir Arnold McNair's Legal Effects of War, 3rd ed., p. 163, which appear to me to summarize correctly the law deducible from the authorities. The author refers to *Andrew Millar & Co. Ld.* v. *Taylor & Co. Ld.*[46] and says: "The Court of Appeal held that the vendors had been "too precipitate, that they should have waited for a reasonable "time before treating the contracts as impossible of performance, "and that the contracts were not in the event frustrated. "Warrington L.J. in a short and illuminating judgment points "out the distinction between illegality which 'arises ipso facto "'from a state of war' and impossibility which may or may not "be the result of an act of the Executive. The same necessity "of waiting a reasonable time appears from *Geipel* v. *Smith*.[47] "This rule does not touch the case where the operative cause

---

[46] [1916] 1 K.B. 402.

[47] (1872) L.R. 7 Q.B. 404, 410.

"is so conclusive as to discharge the contract at once, for in "such a case it would be unreasonable to demand delay." Again, after quoting the passage from Lord Sumner's speech in the *Bank Line* case,[48] to which I have already referred, the author continues (p. 165): "It is submitted that the test can be "stated as follows: Would a reasonable man in the position of "the party alleging frustration, after taking all reasonable steps "to ascertain the facts then available, and without snapping at "the opportunity of extricating himself from the contract, come "to the conclusion that the interruption was of such a character "and was likely to last so long that the subsequent performance "or further performance of the contract would really amount "to the performance of a new contract? If so, there is frustra-"tion. And in considering the probability of the duration, he is "entitled to assume that in so far as the outbreak or the exist-"ence of war is the cause of the interruption that cause is of "uncertain duration. Moreover, the court will not let him suffer "for a determination thus reached if subsequent unexpected "events shew that he was unduly pessimistic in his forecast." Finally, the author again refers to *Andrew Millar & Co. Ld.* v. *Taylor & Co. Ld.*[49] which he says (p. 301) "illustrates the "importance of not being too precipitate in coming to the con-"clusion that State action has made it impossible to carry out "a contract. A party to a contract before making this allega-"tion and acting upon it must wait for a reasonable time in order "to see whether the State interference is brief in its operation or "likely to be for all practical purposes permanent."

The conclusion which I have reached on the facts makes it strictly unnecessary for me to deal with the question whether the plaintiffs' claim, if otherwise well founded, would not have been barred by the warranty concerning loss or frustration of the voyage or adventure, which is in these terms: "Nevertheless this "policy is warranted free of any claim based upon loss of, or "frustration of, any voyage or adventure caused by arrests restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power." The defendant underwriter's submission in regard to this warranty is to the effect that, on the assumption that the Nationalist destroyers imposed a prohibition against the use of Taku Bar, this was a restraint of princes within the meaning of the warranty and, accordingly, that the plaintiffs' claim was based on loss or frustration of the

[48] [1919] A.C. 435, 454.

[49] [1916] 1 K.B. 402.

C. A.
1953

Atlantic Maritime Co. Inc. v. Gibbon.

Jenkins L.J.

voyage or adventure caused by restraint of princes and, therefore, expressly barred by the warranty in question. The plaintiffs succeeded before the judge in meeting this seemingly unanswerable submission by an argument to the effect that, although the prohibition was a restraint of princes, the intervention of the destroyers was also an incident or the consequence of civil war and a war-like operation and, as such, sufficed to support a claim based on one or other of those insured perils irrespective of its character as a restraint of princes. I find it impossible to concur in the judge's acceptance of this argument.

If the peril giving rise to the loss was a restraint of princes, it seems to me that the warranty clearly operated as a bar to the claim, and that it makes no difference that the restraint was imposed in the course of or in consequence of civil war. The only action taken by the destroyers relevant to the claim was the prohibition or restraint on loading at Taku Bar which, for the purposes of this part of the case, they must be assumed to have imposed. Apart from such prohibition or restraint, there was nothing in their activity (whether regarded as civil war or as warlike operations) which could be said to have brought about the loss of freight to which the claim relates; and, so far as I can see, the claim could not be effectively formulated otherwise than by alleging the prohibition or restraint. Clearly, the mere fact of civil war or warlike operations did not make performance of the voyage impossible. The *Atlantic Trader* had herself made at least one voyage to and from Taku Bar while the civil war was in progress. Moreover, considering the matter purely as one of construction, I see no ground for construing the reference to restraints as meaning restraints imposed otherwise than in the course of or in consequence of civil war or warlike operations. That mode of construction, carried to its logical conclusion, would for practical purposes nullify the exception, for restraint of princes would seldom, if ever, occur otherwise than in association with another or others of the various perils insured against. Finally, the question seems to me to be in any case concluded against the plaintiffs by the decision of the House of Lords in *Cory* v. *Burr.*[50]

As to the time clauses, I do not wish to add anything to what my Lord has said; and I also refrain from entering into the difficult question which would have arisen concerning the quantification of the loss, if it had been held recoverable, and express no opinion about it. I conclude that, for the reasons which I have stated, the appeal fails and should be dismissed.

---

[50] (1883) 8 App.Cas. 393.

MORRIS L.J. I am also of the opinion that this appeal fails. The claim made by the plaintiffs is for loss of freight. They have to prove that there was a loss within the terms of the policy. If they show that there was a loss which is recoverable, then the amount of their loss would have to be assessed, and in that connexion clause 7 of the Institute Time Clauses—Freight becomes relevant, for it provides: " Except in respect of a claim " arising under clause 6, the amount recoverable hereunder for " any claim for loss of freight shall not exceed the gross freight " actually lost." The claim of the plaintiffs was that there was an actual total loss of freight amounting to £12,420, which was said to result from, or to have been caused by, hostilities or warlike operations or civil war or from some peril insured against. The plaintiffs must show that there was a loss, and that there was a loss caused by a peril insured against. If they do, then it has to be considered whether the underwriters are absolved by any provision in the policy and whether the amount claimed exceeds the recoverable amount.

It is undoubted that the particular freight under the charter-party of July 16 was lost. The question arises: was it lost by a peril insured against? That was only so if the loss was caused in one of the ways enumerated. The plaintiffs say that the loss was caused by civil war. The judge, after consideration of the facts, has held in these words [51]: " The same facts and circum" stances seem to me to establish the three separate risks of " civil war, restraint and warlike operations." Was, then, the loss so caused? This, in my judgment, is a question of fact. The loss was clearly not so caused if all that happened was that the master of the *Atlantic Trader* was advised temporarily to withdraw his ship or required temporarily to withdraw it. If the master and the owners decided voluntarily to abandon the adventure, then there would not be a loss owing to an insured risk. But the judge came to the following conclusion [51]: " In " the light of the known circumstances, I do not think that a " prudent master could have ignored the warnings and the " happenings which he himself saw. It would seem that it was " not only Taku Bar but the northern Chinese ports which the " master had to leave, and he had no reason to think that the

---

[51] Ante, 99.

"risks were slight or the interference was only temporary. In "those circumstances I find against the defendant's submission "that the act of the master at any material stage was voluntary." I do not find myself prepared to differ from the judge in that conclusion.

The Master of the Rolls in his judgment has stated the considerations which weigh in the one direction and in the other. Speaking for myself, I take the view that those considerations weigh more in favour of the action taken by the owners than against their action. The agreed facts record that what was said to the master was: "Leave the Northern Chinese ports as "soon as possible. If any damage happens the Nationalists will "not take any responsibility." The reference to the Northern China ports suggests something more than a mere local operation, something bigger than a raid or something different from mere temporary operations in a locality. What the master did was to withdraw and proceed slowly and await orders; and he reported the situation in a telegram which records the facts of the situation with substantial accuracy.

From the evidence which was additionally before the judge, it appeared that two of the other Panamanian ships were compelled by threats from naval vessels to leave the port with a warning that they were not to return. Those ships did not return. I think that there is force in the submission made by Mr. Mocatta that it would have been a situation of difficulty for the *Atlantic Trader* if, in defiance of the warnings or orders given, she had been again found by a Nationalist destroyer in the prohibited area. The list of the sailings into Taku Bar and the taking on of cargo by other ships is not in my judgment at all conclusive. We were told that the ships were all liners, and, as to the majority of them, they were flying the American flag and were making a stay of short duration in contrast to the time of about 10 days which would have been occupied by the *Atlantic Trader* in taking on her cargo.

The new charter, which was entered into by the owners, was entered into within a very short time, but it does not seem to me that, in a case where there has been full discovery of documents, any interpretation of the facts adverse to the owners ought to be drawn from that circumstance. There was, I think, at least the risk that, if the ship had later returned and had been destroyed, the owners might have been under peril of it being said against them that they had thrown their ship away, whether that suggestion would or would not benefit in litigation those who made it. Though the authorities show that the owners are not entitled to act precipitately, they are not to be criticized merely because subsequent events, or later acquired knowledge, suggest that they took a view which in retrospect may have been unduly pessimistic.

On a reasonable view of the facts known at the time and of the future prospects as they might reasonably have been assessed, I do not feel prepared to say that the owners were not entitled to conclude that they were, and would be prevented from, carrying out the charterparty. It was not, in my judgment, wrong for them to decide that they would not be justified at that time and for a reasonable time ahead in attempting to defy the orders and warnings given. In considering in this connexion the question of time, I have in mind a passage in the speech of Lord Wright in *Joseph Constantine Steamship Line Ld.* v. *Imperial Smelting Corporation Ld.*,[52] where he used the words "within "any time consistent with the commercial or practical adven"ture." I think that in that connexion also some words used by Lord Sumner in his speech in the *Bank Line* case[53] are relevant. He said: "Rights ought not to be left in suspense or "to hang on the chances of subsequent events. The contract "binds or it does not bind, and the law ought to be that the "parties can gather their fate then and there."

For the reasons which I have stated, I do not feel prepared to differ from the conclusion reached by the judge on this part of the case.

The underwriters are, however, in my view relieved from liability by the terms of the clause which has been called the frustration clause. Here the claim of the plaintiffs is that they have suffered the loss of the voyage or adventure the subject of the charterparty of July 16, and that such loss was caused by the restraint of kings, princes, peoples, usurpers or persons attempting to usurp power. That is in reality the claim made by the plaintiffs, even though they choose merely to say that the loss was caused by civil war. The purpose of the words in the frustration clause is to exclude a liability otherwise arising. The word "nevertheless" by which the clause is introduced demonstrates that. It seems to me that the only question here is whether these words apply. In my view they do, and the claim

[52] [1942] A.C. 154, 183; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[53] [1919] A.C. 435, 454.

made by the plaintiffs is covered by this exception clause which relieves the underwriters from liability.

I will only add that a useful citation was made by Sir Robert Aske in his argument dealing with this part of the case when he referred to what Lord Sumner said in *P. Samuel & Co. Ld.* v. *Dumas*[54]: "Where a loss is caused by two perils operating "simultaneously at the time of loss and one is wholly excluded "because the policy is warranted free of it, the question is "whether it can be denied that the loss was so caused, for if not "the warranty operates."

I therefore think that the claim of the plaintiffs is defeated by the language of the clause which I have been considering. This view makes it unnecessary for me to express any concluded opinions in regard to the two remaining questions. I would like to express my concurrence with the observations made by the Master of the Rolls in his judgment in dealing with the question of loss of time and the questions which arise on a consideration of the clause: "Warranted free from any claim consequent on "loss of time whether arising from a peril of the sea or other-"wise." As my Lord has pointed out, the most recent of the cases dealing with this clause is one which went to the House of Lords, *Robertson* v. *Petros M. Nomikos Ld.*[55] My Lord has already referred to what was said by MacKinnon L.J. when that case was before this court.[56] In the House of Lords in his speech Lord Atkin said[57]: "I wish, however, to reserve the question "whether the claim in this case was in any view consequent on "loss of time. The question appears to me to be in every case "a question of fact, and the authorities should be treated from "that point of view." That observation was concurred in also by Lord Thankerton.

The question which has to be determined, when this clause is under consideration, is whether the claim made is consequent on loss of time. The words "whether arising from a peril of "the sea or otherwise" do not add anything. They are mere surplusage, as Bailhache J. pointed out in his judgment in the *Russian Bank* case.[58] The precise words of a clause of this nature may differ slightly, but probably not significantly. The wording in the *Russian Bank* case[58] was slightly different from that in the *Bensaude* case.[59] But Bailhache J. expressly said that he did not think that there was any difference in meaning between the two sets of words. In the case before Roche J., *Roura & Forgas* v. *Townend*,[60] the wording was "excluding all "claims arising from delay." In the *Bensaude* case [61] the facts showed that the claim was consequent on the fact that the ship was going to be delayed for a period of time. In the *Russian Bank* case [62] the claim was held to be consequent on the fact that the ship was delayed at Novorossisk because the Dardanelles were closed.

---

[54] [1924] A.C. 431, 467; 40 T.L.R. 375.

[55] [1939] A.C. 371.

[56] [1938] 2 K.B. 603, 628.

[57] [1939] A.C. 371, 377.

[58] [1918] 2 K.B. 123.

In the present case, the claim is not that the ship was delayed or that there was a loss of time, but that a contract was lost, and that in spite of the fact that there was no loss of time, or no appreciable loss of time, a claim can be made for the actual loss of freight. Though I find it unnecessary, as my Lord has found it unnecessary, to express any concluded opinion, if I may treat the matter as an open one, as directed by Lord Atkin, in the sense that the decided cases can merely be regarded as decisions of fact which are not to trammel a fresh determination of the facts of a new case, then I express the doubt whether, on the facts of this particular case, it could be said that the claim made was one consequent on loss of time.

There is, finally, the question as to what would have been the amount recoverable had recovery been possible. Again, I do not find it necessary to express any concluded opinion. The policy covers loss of freight or anticipated freight or chartered freight during a three-month period, and, as it is a policy of insurance, the reminder given by Roche J. in *Roura & Forgas* v. *Townend*,[63] in a passage cited to us by Mr. Roskill in his argument, is worthy to be borne in mind. Roche J. referred to the principle that an assured cannot, under a contract of indemnity, although he may at one time have suffered a loss, recover in respect of such loss if, before action, it has already been made good to him. The insurance in this case covered a loss of money to be earned in the employment of the ship. Though I express no final opinion, it would seem to me to be contrary to good sense if, in a case where the ship remained intact as a freight-earning vehicle, no account need be taken or allowance made in respect of earnings resulting from the employment of

---

[59] [1897] A.C. 609.

[60] [1919] 1 K.B. 189.

[61] [1897] A.C. 609.

[62] [1918] 2 K.B. 123.

[63] [1919] 1 K.B. 189, 196.

C. A.
1953

ATLANTIC MARITIME CO. INC. *v.* GIBBON.

the ship under a new and substituted contract referable to a period of time covered by a contract which could not be performed.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Ince & Co.; Thomas Cooper & Co.*

B. A. B.

C. A.
1953
Nov. 25, 26;
Dec. 15.

Somervell, Denning and Romer L.JJ.

REGINA *v.* MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* CORPORATION OF LONDON.

Town and Country Planning—Purchase notice by owner—Refusal of permission to develop—Land let at less than rack-rent—"Owner" of land—Whether freeholder owner—Rack-rent—Derelict and sterilized site—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 19 (1), 119 (1).

The Corporation of London were the assignees of a lease for 75 years from 1925 at a rent of £750 a year (then less than a rack-rent) of premises which, due to bomb damage, had in 1941 become a derelict site. In March, 1952, the freeholders applied to the corporation as local planning authority for permission to develop the site, but the corporation, who proposed to incorporate the site in a road-widening scheme, refused permission. In September, 1952, the freeholders purported to serve a notice on the corporation under section 19 (1) of the Town and Country Planning Act, 1947, requiring the corporation to purchase their interest in the land:—

Held, that the freeholders were "owners" within the meaning of section 19 and therefore entitled to serve the purchase notice, since (*per* Somervell and Romer L.JJ.) the definition of "owner" in section 119 (1) was not appropriate for section 19, and a person in whom an estate in fee simple was vested was a person whose interest was damaged by the sterilization and contemplated as an "owner" by section 19.

Per curiam. Section 19 contemplated that there might be more than one owner of land at one and the same time.

Per Denning and Romer L.JJ. The definition of "owner" in section 119 (1) included the freeholders in the present case, since, in this context, the words "if it were so let" meant (*per* Denning L.J.) both "if it were to be so let" and "if it had been so let," or (*per* Romer L.J.) "if it had been so let."

Truman, Hanbury, Buxton & Co. v. *Kerslake* [1894] 2 Q.B. 774 distinguished.

Per Denning L.J. If the freeholders are not owners within section 19 then I agree that the context of that section "otherwise "requires" that they should be deemed to be owners within that section.

Per Romer L.J. The person in whom the land is vested for an estate in fee simple, subject only to a lease, is prima facie "an "owner" of the land and is, indeed, according to the ordinary significance of the term, "the" owner.

Quaere, whether the £750 was or was not now a rack-rent in that it represented the full value of the derelict and sterilized site.

Decision of Divisional Court [1953] 2 Q.B. 83; [1953] 2 W.L.R. 1083; [1952] 2 All E.R. 80 reversed.

APPEAL from a Divisional Court.[1]

An application for an order of certiorari was made by the Corporation of London in respect of a decision dated December 31, 1952, made by the Minister of Housing and Local Government pursuant to the Town and Country Planning Act, 1947, purporting to confirm a purchase notice purported to be served under section 19 [2] of the Act in respect of the fee simple of the site of No. 69, Ludgate Hill, in the City of London, the notice being given by or on behalf of the trustees of the real estate of Alexander Jones, deceased.

---

[1] [1953] 2 Q.B. 83; [1953] 2 W.L.R. 1083; [1953] 2 All E.R. 80.

[2] Town and Country Planning Act, 1947, s. 19: "(1) Where permis-"sion to develop any land is refused, "whether by the local planning "authority or by the Minister, on "an application in that behalf made "under this Part of this Act, or is "granted by that authority or by the "Minister subject to conditions, then "if any owner of the land claims— "(*a*) that the land has become incap-"able of reasonably beneficial use in "its existing state; and (*b*) in a case "where permission to develop the land "was granted as aforesaid subject "to conditions, that the land cannot "be rendered capable of reasonably "beneficial use by the carrying out of "the permitted development in accord-"ance with those conditions; (*c*) in "any case, that the land cannot be "rendered capable of reasonably bene-"ficial use by the carrying out of "any other development for which "permission has been or is deemed to "be granted under this Part of this "Act, or for which the local planning "authority or the Minister have "undertaken to grant such permission, "he may, within the time and in the "manner prescribed by regulations "made under this Act, serve on the "council of the county borough or "county district in which the land is "situated a notice (hereinafter referred "to as a 'purchase notice') requiring "that council to purchase his interest "in the land in accordance with the "provisions of this section. (2) Where "a purchase notice is served on any "council under this section, that "council shall forthwith transmit a "copy of the notice to the Minister, "and subject to the following pro-"visions of this section the Minister "shall, if he is satisfied that the "conditions specified in paragraphs "(*a*) to (*c*) of the foregoing subsection "are fulfilled, confirm the notice, and "thereupon the council shall be "deemed to be authorized to acquire "the interest of the owner compul-"sorily in accordance with the pro-"visions of Part IV of this Act, and "to have served a notice to treat in "respect thereof on such date as the "Minister may direct. . . . (3) If "within the period of six months "from the date on which a purchase "notice is served under this section "the Minister has neither confirmed "the notice nor taken any such other

On September 29, 1873, the Commissioners of Sewers, who were then owners of the premises, leased the land to one T. Treloar for 80 years at a ground rent of £350 per annum. Subsequently the Commissioners of Sewers transferred their reversion in the freehold to Alexander Jones. On May 23, 1922, the trustees of T. Treloar sublet the premises to Messrs. Williamson and Walker for the remainder of the term at a rental of £1,136 per annum. On June 23, 1925, a further lease was made by the trustees of Jones to Messrs. Williamson and Walker for a period of 75 years at a rental of £750 per annum. In 1940 that lease was transferred to Hampton & Sons Ld., who later acquired the residue of the term of the lease granted in 1873.

In 1940 and 1941 the premises were damaged by enemy action to such an extent as completely to destroy the buildings on the land. Thereafter, the site was left derelict as a bombed site. On February 9, 1950, Hampton & Sons Ld. gave notice asking for permission to develop the site, but were refused permission by the Corporation of London as the town planning authority. The reason for the refusal was: "That the proposed "development would prejudice the new layout of the area of "extensive war damage in which the site is situated, including "the provision of a roundabout at the junction of Ludgate Hill, "New Bridge Street, Fleet Street, and Farringdon Street." On August 17, 1950, Hampton & Sons Ld. served a notice under section 19 (1) of the Act of 1947 requiring the corporation to purchase their interest in the land at 69, Ludgate Hill.

The corporation, as required by section 19 (2), sent a copy of the notice to the Minister, and taking the view that Hampton & Sons Ld. were the owners within the Act, and that

---

"action as is mentioned in paragraph "(*a*) or paragraph (*b*) of the last "foregoing subsection, nor notified "the owner by whom the notice was "served that he does not propose to "confirm the notice, the notice shall "be deemed to be confirmed at the "expiration of that period, and the "council on whom the notice was "served shall be deemed to be "authorized to acquire the interest of "the owner compulsorily in accordance with the provisions of Part IV "of this Act, and to have served "notice to treat in respect thereof at "the expiration of the said period."

S. 119 (1): ". . . . except so far as "the contrary is provided or the context otherwise requires . . . 'owner,' "in relation to any land, means . . . "a person . . . who, whether in his "own right or as trustee or agent "for any other person, is entitled to "receive the rack rent of the land or, "where the land is not let at a rack "rent, would be so entitled if it were "so let. . . ."

the Minister was bound to grant his certificate confirming the notice because of the existing state of the land, took no steps to be heard in opposition to the application to confirm the notice. By notice dated November 9, 1950, the Minister confirmed the notice, and the sum of £71,250 was paid by the corporation to Hampton & Sons Ld. for their leasehold interest in the premises. That interest was assigned to the corporation; the title of the corporation was duly registered at the Land Registry and a certificate issued.

On March 24, 1952, the trustees of Jones applied for permission to develop the site, but were refused. They then appealed to the Minister, who disallowed their appeal and refused his permission for development of the land. On September 1, 1952, the trustees purported to serve on the corporation under section 19 (1) of the Act a notice requiring the corporation to purchase their interest in the land, that was to say, the fee simple. On September 3 the corporation transmitted a copy of the notice to the Minister, who, having given the parties an opportunity of being heard upon the application, on December 31, 1952, notified his decision as follows: "The Minister accepts "the view put forward by the trustees that he is not concerned "with the question of ownership and that his duties in relation "to the notice are confined to considering the conditions mentioned in paras. (*a*) to (*c*) of subsection (1) and whether they "are fulfilled in relation to the land. He is satisfied that they "are fulfilled and it appears to him that he has no discretion to "refuse to confirm the notice: he must, he is advised, proceed "under subsection (2) if the notice is not withdrawn. His confirmation in these circumstances does not, of course, import "any decision as to whether the servers of the notice are owners "entitled to serve such a notice or not."

The corporation thereupon moved for an order of certiorari to quash the order of the Minister on the ground that the trustees as the servers of the notice were not the owners of the land within the meaning of section 119 (1) or section 19 (1) of the Act.

The application came before the Divisional Court (Lord Goddard C.J., Lynskey and Parker JJ.) on April 29, and was granted, the court holding that the word "owner" in section 19 (1) of the Town and Country Planning Act, 1947, had the same meaning as that contained in section 119 (1); that, the land having been let to the corporation, the trustees were not persons entitled to receive the rack-rent; that accordingly they were not owners entitled to give a purchase notice under section 19 (1); and that therefore the notice was a nullity.

The trustees appealed.

H. Heathcote-Williams Q.C. and *Oliver Lodge* (*R. E. Megarry* with them) for the trustees. If town planning permission to rebuild is not obtainable then the land is not reasonably capable of beneficial development. The question then arises who are the "owners" of the property. We are not concerned to show that Hamptons were not owners and therefore should not have been paid compensation. The question is whether it is not manifestly the intention of section 19 (1) of the Act that all persons having an interest in the land shall be bought out. Section 19 says "any owner" and not "the owner," and it is submitted that it means any person having any interest.

[Romer L.J. If that is right I cannot understand why it does not say "any owner of the land or any person who has an "interest therein."]

The trustees will get no rent and what will be the position in 1999 when the land reverts to them as freeholders? They have lost their rent of £750 a year and receive no compensation.

[Somervell L.J. It seems odd that a local authority can by its own act render land incapable of reasonable beneficial development and then deny the freeholders compensation.]

The question of the Minister's jurisdiction is not raised by the appeal. The material question is whether at the date of their notice to purchase the trustees were "owners" for the purpose of section 19 (1). Section 119 (1) defines "owner" as "a person "who . . . is entitled to receive the rack-rent of the land or, "where the land is not let at a rack-rent, would be so entitled "if it were so let." The trustees are not concerned with whether at the time when the lease was negotiated the rent of £750 was a rack-rent, but it is submitted that in 1952, when the notice to purchase was served, £750 was a very full rack-rent for premises which had been bomb damaged and sterilized. The lease was still on foot although the rent had been suspended.

The Divisional Court held that the word "owner" in section 19 (1) had the same meaning as "owner" in section 119 (1), but it is submitted that the contrast between the definition in section 119 (1) and the use of the word "owner" in section 19 (1) is that the latter section is dealing with land which has been sterilized, whereas section 119 (1) is concerned with land which is either let at a rack-rent or could be so let. At the material time there was no owner within the definition in section 119 (1), which exemplifies the fact that that section does not apply to section 19 (1).

If it had been contemplated that there should be only one "owner" for the purpose of section 19 (1), the use of the word "any" was singularly inappropriate. It is not suggested that an owner within section 119 (1) could not also be an owner for the purpose of section 19 (1), but it is contended that the word "owner" in section 19 (1) is not restricted to a particular owner but extends to any person interested in the land. That is consistent with the ordinary understanding of justice. But the two sections are reconcilable, because in section 119 (1) the opening words are "except so far as the contrary is provided or the context "otherwise requires." Here the context does require a different interpretation.

As to the meaning of rack-rent see *In re Sawyer and Withall* [3]; Blackstone's Commentaries [4]; *Rawlance* v. *Croydon Corporation*,[5] and *Ex parte Connolly to Sheridan & Russell*.[6]

[The following cases were also referred to: *London County Council* v. *Wandsworth Borough Council* [7]; *Great Eastern Railway Co.* v. *Hackney District Board of Works* [8]; *Wright* v. *Ingle* [9]; *Truman, Hanbury, Buxton & Co.* v. *Kerslake*.[10]]

Harold B. Williams Q.C. and *Derek Walker-Smith* for the corporation. In determining whether the premises were let at a rack-rent one must consider the position at the date when the lease was negotiated and not, as has been suggested, at the date when the purchase notice was served by the trustees: *Borthwick-Norton* v. *Collier*.[11] If the trustees are "owners" within the meaning of section 19 (1), they are entitled to succeed on the appeal, but it is submitted that they are not owners. The question is whether the definition of "owner" in section 119 (1) applies to "owner" in section 19 (1). If it does not, then a different meaning has to be given to "owner" in section 19 (1). True the definition is to apply "unless the context otherwise requires," but there is nothing in section 19 (1) which would require the adoption of any other meaning. It is significant that in sections 21 to 33 the word "owner" is coupled or contrasted with "the

---

[3] [1919] 2 Ch. 333; 35 T.L.R. 611.

[4] 2 Blackstone's Com. p. 43.

[5] [1952] 2 Q.B. 803; [1952] 2 T.L.R. 460; [1952] 2 All E.R. 535.

[6] [1900] 1 I.R. 1.

[7] [1903] 1 K.B. 797; 19 T.L.R. 372.

[8] (1883) 8 App.Cas. 687.

[9] (1885) 16 Q.B.D. 379; 2 T.L.R. 143.

[10] [1894] 2 Q.B. 774; 10 T.L.R. 668.

[11] [1950] 2 K.B. 594; 66 T.L.R. (Pt. 2) 131; [1950] 2 All E.R. 204.

"occupier," "other persons interested in the land," and in some instances other persons "affected," and in section 27 a right is expressly given to a person entitled to an interest in the land to serve a purchase notice. That difference in language indicates that the legislature was dealing in section 19 with owners of land alone and not with persons who can claim to possess any kind of interest therein. It is conceded that "owner" in ordinary language is apt to describe the freeholder of property, but here the word is used in relation to rack-rent, which is described by Blackstone as the full annual value of the tenement or something near it. See also *Rawlance* v. *Croydon Corporation.*[12]

[SOMERVELL L.J. Section 27 is dealing with existing use. Here you are concerned with undeveloped land which is being sterilized.]

In the ordinary case where there is a lessee paying a ground rent the interest of the freeholder is not being disturbed. He remains entitled to receive the rent.

[SOMERVELL L.J. I cannot agree to that. He may wish to sell his property and its value is being affected.]

When the legislature wishes to give a title to any person having an interest in the land it says so.

[SOMERVELL L.J. There may be other interests in the land which may be affected if "owner" is confined to the definition in section 119.]

There is no language in section 19 which requires the court to give to "owner" any meaning other than appears in section 119. When a purchase notice is served one must look at the person serving it to see if he is the person entitled to receive the rack-rent. Until the leases have gone and he is entitled to possession the freeholder is not entitled to serve a notice.

It was suggested that the words in section 119 which refer to a person who would be entitled to a rack-rent "if it were so let" mean the freeholder. That cannot be right. The court must look at the circumstances as they exist and ascertain who is the person who is in a position to let at a rack-rent. Where there is a ground lease the person who has a right to receive a rack-rent is the ground lessee. Once the freeholder grants a ground lease he cannot let at or receive a rack-rent.

J. P. Ashworth for the Minister. The crucial words in section 19 are "any owner." "Land" as used in that section refers to physical land. Looking at land only, a person who has merely an interest in land is ruled out. Land is capable of being owned by more than one person, and more than one person can make a claim as owner. If the section had been meant to refer to the freeholder it would have said "the owner" and not "any "owner." The definition in section 119 is the one description which applies. It is conceded that without that definition the inclination would be to accept the freeholder as the owner, but section 19 deals with very special facts, namely, where land cannot be used at all. [*Rawlance* v. *Croydon Corporation*[13] and *Cook* v. *Montagu*[14] were referred to.]

---

[12] [1952] 2 Q.B. 803.

Heathcote-Williams Q.C. replied.

Cur. adv. vult.

December 15. The following judgments were read.

SOMERVELL L.J. The only question before us is whether the appellants are "any owner" within the meaning of section 19 (1). [His Lordship read the relevant parts of the section and continued:] In 1873 C, the then freeholders, leased the land to T for 80 years at £350 per annum. This was, we were told, a ground lease. At some date before 1925 the appellants acquired the freehold reversion. In 1922 T's trustees, T having died, sublet to W at £1,136 a year for the remainder of the term less seven days. By a lease of June 23, 1925, between the appellants and W, the sub-lessee, the premises were let for 75 years at £750 a year. This was said to be concurrent with and with the benefit of the original lease which at that date had some 28 years to run. The result was that T's trustees paid the £350 to their sub-lessee; W got an extension of his lease and would pay £400 more during the period of the 1873 lease, that is, the sub-rent less £350 plus £750. After 1953 he would pay £750 only. The premises were completely destroyed by enemy action in May, 1941. W had by this time assigned to Hamptons, who continued to pay the £750 rent. In April, 1942, Hamptons obtained an assignment from T's trustees of the original leasehold interest. Thereafter there were two parties only, the appellants and Hamptons, the 1873 lease being formally deleted from the register by the Land Registry in 1951. Under section 12 of the Act of 1947 permission to develop has to be obtained from the planning authority—in this case the respondents, Corporation of London. On February 9, 1950, Hamptons applied for such permission, the development being the rebuilding of the destroyed premises. On May 2 this was refused, for the reason that under the respondent's plan for this area the site in question was to be part of a roundabout. Hamptons thereupon served a purchase notice, undated, which was forwarded to the Minister on August 21, 1950. On September 22 the Minister caused a letter containing the following paragraph to be written to the town clerk: "The Minister is satisfied that the land has become incapable of "reasonably beneficial use in its existing state and, having "regard to the fact that it is situated within the boundaries of "the City of London Declaratory Order, and is affected by "proposals for the comprehensive redevelopment of the sur-"rounding area of extensive war damage, including the provision "of a roundabout at Ludgate Circus, he does not consider that "he would be justified in reversing the Common Council's "decision of May 2, 1950, whereby permission to rebuild was "refused, or in directing that permission should be granted for "any other development." The writer went on to say that unless any of those entitled wished to be heard he would confirm the notice, which he did on November 9, 1951.

---

[13] [1952] 2 Q.B. 803.

[14] (1872) L.R. 7 Q.B. 418, 422.

The appellants had no notice of these various steps. Hamptons' interest was ultimately purchased for £71,250. On November 27, 1951, a notice of retention under section 10 of the Landlord and Tenant (War Damage) Act, 1939, was served by Hamptons on the appellants. The effect of such a notice under section 10 is to relieve the tenant of rent and to impose on him a covenant to reinstate. It gives the landlord a right to claim the rent in whole or in part if the tenant fails to reinstate when it is practicable for him to do so. The notice of retention was served according to the evidence on the procuration of the Corporation of London. The corporation are, as will be seen, using their statutory powers to make the fulfilment of the covenant to reinstate illegal. Whether in these circumstances they can maintain the non-payability of rent is not before us. It would seem a remarkable contention. On March 24 the appellants asked for planning permission to erect a building similar to that destroyed. This was refused and the appellants appealed to the Minister against this refusal and the appeal was dismissed. The appellants on September 1, 1952, served a purchase notice. The corporation contended that the appellants were not owners. The appellants submitted to the Minister, but do not submit to us, that the Minister was not concerned with the question of ownership. The Minister, one imagines, gratefully accepted this submission and on that basis confirmed the notice. If the appellants are "any owner," then the confirmation stands. If, as the Divisional Court have held, they are not, it is a nullity. "Owner" is defined, unless the context otherwise requires, in section 119: "'Owner,' in relation to any land, "means, except in Part VI of this Act"—and we are concerned with Part III—"a person, other than a mortgagee not in "possession, who, whether in his own right or as trustee or agent "for any other person, is entitled to receive the rack rent of "the land or, where the land is not let at a rack rent, would "be so entitled if it were so let." Then: "'Land' means any "corporeal hereditament, including a building as defined by this "section, and in relation to the acquisition of land under Part IV "of this Act includes any interest or right in or over land."

It was submitted to the Divisional Court, and to this court, that the definition does not apply to section 19 because the context "otherwise requires." The Divisional Court held that it did apply, and quashed the Minister's order. The definition, or a definition on similar lines, is to be found in other Acts. It has come before the court before. Its obscurity and difficulty is always common ground between the parties inter se and the court. I will give an illustration. A, the freeholder, lets to B at below the full value. B may be an old servant or an impecunious friend. The lease is a quarterly one and there is no prohibition against subletting. In *Truman, Hanbury, Buxton & Co.* v. *Kerslake* [1] premises were let and sublet at a rent below the rack-rent. The sublessee was held to be the owner under a definition similar to that with which we are concerned. Kennedy J. said: "The words of the section in our judgment, in the case "of there being no one who in fact receives a rack-rent from the "actual occupier, designate as 'owner' the person who 'rebus "'sic stantibus,' that is to say, with the interests in the "premises as they then are, would, if they were let to an "occupier at a rack-rent, receive that rack-rent." If that case is right, then in the case I have put B is the owner and A is not. The leases in *Truman, Hanbury, Buxton & Co.* v. *Kerslake* [1] were longer, but the decision was not based on this, and there is nothing in the definition to indicate that if actual leases are to be regarded their length is material. This case may well not be of general application, but it illustrates the difficulty of construing the definition. If in the case I have put there had been a prohibition against subletting, Mr. Williams, for the respondents, admitted that on his construction of the definition there would be no owner. In *Truman's* case [1] the owner as defined was for the purpose of serving a notice of nuisance.

---

[1] [1894] 2 Q.B. 774, 778.

In *Rawlance* v. *Croydon Corporation*,[2] where the subject-matter was similar, *Truman's* case [1] was doubted. I am quite clear that if *Truman's* case [1] is right the definition cannot apply to section 19. If *Truman's* case [1] is wrong it must be on the basis that one does not, ordinarily at any rate, consider the de facto lease or chain of leases. In the instance put above the landlord is the person who would be entitled to receive the rack-rent if he had not chosen to let below it. One would, therefore, disregard actual leases, and in the case of ordinary leases there is no difficulty. It is, however, I think, clear that the definition is intended to bring in a ground lessee. The position there is different. The ground lessee has himself created the value, that is, the house, which is the major ingredient in the rack-rent. It is therefore logical that he should, for certain purposes at any rate, be treated as owner. He is often so described. Is it possible, however, so to read the definition as to disregard existing leases other than ground leases but to have regard to ground leases? I think not. On this view, although the formula may be appropriate in certain contexts, I am clear that it is not appropriate for section 19. That section requires that "any owner" should include the person or persons the value of whose "ownership" is damaged by the "sterilization." This clearly covers the freehold reversioner, in this case the appellants, whose interest is plainly affected. It may, I think, also cover a ground lessee in certain cases: if, for example, the land was sterilized before the building had been erected. Fire or war damage might also cause him to be affected.

The case was put alternatively on the basis that the £750, whatever its nature in 1925, was now a rack-rent, in that it represented the full value of the derelict and sterilized site. If this were right the land would now be let at a rack-rent and the appellants would be owners under the early part of the definition. It was suggested that this was inconsistent with *Borthwick-Norton* v. *Collier*.[3] That case was concerned with a similar definition, applicable to an owner as the person entitled to receive compensation for damage to land under requisition. The land had been let in 1934 for a sum held to be a rack-rent at that date. When the compensation became payable in 1947 it had, it was said, ceased to be a rack-rent owing to a change in value. Hilbery J. decided that the relevant date was the date when the lease was negotiated, and that was affirmed by this court. It would be absurd if any rise in rental values turned a rack-rent lessee into an owner. It is said that the converse follows and that a rent negotiated as below a rack-rent cannot by change of circumstances or planning restrictions become a rack-rent. I do not find it necessary to decide this point, so I will only say that I do not think that the decision in *Borthwick-Norton* v. *Collier*[3] is fatal to the argument. I look forward to the day when this definition may be replaced in the various Acts which contain it by some more intelligible formula. I would allow the appeal.

---

[1] [1894] 2 Q.B. 774, 778.
[2] [1952] 2 Q.B. 803.
[3] [1950] 2 K.B. 594.

DENNING L.J. On May 10, 1941, a building near Ludgate Circus was destroyed by the enemy. It was owned by the Jones's trustees, who were the freeholders, but it was leased to Hamptons at £750 a year on a long lease expiring in 1999. (There were other interests subsisting in 1941, but they were got in by Hamptons in 1942 and are not now material.) Hamptons for many years did not give a notice of disclaimer or a notice of retention under the Landlord and Tenant (War Damage) Act, 1939. They simply paid the £750 a year to the freeholders and relied on the provisions of the Act exempting them from any obligation to rebuild. In 1950 Hamptons applied to the City Corporation for permission to rebuild. The corporation refused because they wanted to throw the site into the highway, so as to make a roundabout at Ludgate Circus. Thereupon Hamptons, under statutory authority, called upon the corporation to buy their interest in the site. The corporation did so. They bought the remaining 47 years of Hamptons' lease for £71,250. This price was fixed on the hypothesis that the premises had been rebuilt, and, therefore, I presume on the basis that a rent of £750 a year was payable by Hamptons for their lease.

I cannot believe that the corporation would pay Hamptons on the hypothesis that the premises had been rebuilt without taking into account that a rent of £750 a year was payable for it when rebuilt. But the singular thing is that shortly before the purchase was completed steps were taken by Hamptons to avoid payment of the £750. They did this at the instance of the City Corporation. They served a notice of retention on the freeholders, which automatically suspended the rent of £750 a year until the premises were rebuilt. By serving this notice

---

[3] [1950] 2 K.B. 594.

Hamptons avoided payment of the rent, but they came under an obligation to rebuild as soon as reasonably practicable. Once rebuilt the rent would again become payable, but inasmuch as the corporation had decided never to allow any rebuilding on the site, it would never be reasonably practicable to rebuild, and the rent would, it is said, never become payable again: though I am not so sure about this. Anyhow, it looks as if, by this notice of retention, Hamptons—and the City Corporation as their successors—may have got out of paying the rent of £750 a year for the rest of the term; and yet the corporation paid a price fixed on the footing that the rent was payable. The net result is that the corporation have bought from Hamptons on the footing that £750 a year was payable, but, nevertheless, they can turn round to the freeholders and say that £750 is not payable. The freeholders are unwilling to submit to this state of affairs and one can hardly be surprised at it. They have countered by saying to the corporation: "You have bought out the interest of Hamptons. "You must buy us out also. We also are owners and thus "entitled by statute to insist on your purchasing our interest on "the footing that the premises have been rebuilt, that is, on the "footing that £750 a year is payable to us." The corporation say to them: "You are not entitled to insist on this because you "are not owners within the meaning of the statute."

The rights of an owner in this respect are given by section 19 of the Act of 1947, and the question is whether the freeholders are "owners" within that section. The fact that Hamptons are owners does not exclude the possibility of the freeholders being owners also: because that Act contemplates that there may be more than one "owner" of land at one and the same time. That is shown by the phrase "any owner" (not *the* owner) in section 19 and *a* person (not *the* person) in section 119. Section 119 contains a definition of "owner" which is to be applied except so far as the context otherwise requires. I propose, therefore, to consider first whether the freeholders are "owners" within section 119.

In some instances there is not much difficulty in applying the definition in section 119: for instance, when the land itself was originally let at a ground rent and subsequently buildings have been erected on it and the whole let at a rack-rent. The ground lessee is certainly an "owner"; for he is a person who is entitled to receive the rack-rent. So, also, when there is a series of leases and subleases of the building, each of which was let at a rack-rent when it was negotiated. Each person who receives a rack-rent would seem in that case to be an "owner."

The difficulty arises when we come to cases where the land and buildings are let at more than a ground rent but less than a rack-rent; and the difficulty arises from an ambiguity in section 119. The words "if it were so let" may mean either (1) "if it "*were to be* so let," or (2) "if it *had been* so let." I think that the words should be given either or both of those meanings according to the circumstances of the case. This can best be shown by some illustrations: take, first, a case where a house is not let at all. The freeholder is certainly an "owner"; and the reason is because he comes within the first meaning. He is a person who would be entitled to the rack-rent if it *were to be* let at a rack-rent. Take next a case where there is no ground rent and a house is let by the freeholder, at less than a rack-rent, on a short-term tenancy or a periodic tenancy. The freeholder is certainly then an "owner" and the reason is because he comes within the second meaning: he is a person who *would have been* entitled to the rack-rent of the land if it *had been* in the past let at a rack-rent. Thus when a freeholder lets a house to a friend or a servant at less than a rack-rent, he is an "owner" of it: see *Rawlance* v. *Croydon Corporation.*[4] Take now the present case, and it will be found, I think, that both Hamptons and the freeholders are "owners." First, Hamptons. They had a lease with nearly 50 years to run and they were paying £750 a year to the freeholders. That was more than a ground rent but less than a rack-rent. If the premises in 1951 *were to be* let at a rack-rent, they would be the persons entitled to it. They come within the first meaning and are "owners" accordingly. Next, the freeholders. They were not, in 1952, receiving a rack-rent but that was only because the premises had not been let at a rack-rent. The freeholders were the people who *would have been* entitled to that rack-rent, if it *had been* let at a rack-rent. They come within the second meaning and are "owners" accordingly.

I do not see any reason why we should not give the words of section 119 this two-fold meaning. In *Truman, Hanbury, Buxton & Co.* v. *Kerslake*[5] the court seems to have thought that the words "if it were so let" meant in all cases "if it *were to be* "so let." That may have been the proper meaning to adopt in that case, but it is not so in this case. I think that the freeholders here were "owners" within section 119 and entitled accordingly. If the freeholders are, however, not "owners" within section 119, then I agree with my Lord that the context of section 19 "otherwise requires." It requires that the freeholders should be owners for the purposes of section 19. The section is concerned with land which has been rendered, by executive action, for ever sterile. Parliament must have intended that the freeholders should have the right to insist on being bought out.

---

[4] [1952] 2 Q.B. 803.

[5] [1894] 2 Q.B. 774.

I agree, therefore, with my Lord that the appeal should be allowed and the order of the Minister upheld.

ROMER L.J. The question for our decision is whether the appellants were "owners" of No. 69, Ludgate Hill, for the purposes of section 19 of the Town and Country Planning Act, 1947, on September 1, 1952, when they served upon the City Corporation a purchase notice under the section in respect of the said premises. The appellants' position on that date was, as it still is, that they were the freeholders of the property subject to a lease which was and is vested in the corporation for a term which will expire on September 29, 1999.

Before considering what the word "owner" in section 19 means, it is convenient, I think, to consider whether it is referable to only one person in relation to any particular property or whether it may refer to more than one. In my opinion the section contemplates that there may be more than one owner of land in respect of which development permission is refused. In the first place, the phrase is "any owner" and not "the owner," which appears to me to be in itself almost decisive of the question. But, in addition to this, the section refers to the "interest "in the land" of any owner who serves a purchase notice, and (in subsection (2)) to "the interest of the owner"—language which seems to be indicative of the existence of other owners' interests as well. I think, therefore, that the existence of relevant interests other than that of the owner who serves a purchase notice is within the contemplation of the section. It is to be presumed, however, that such other interests are intended to remain unaffected by the service of such a notice, for only the person who serves it is to be notified of subsequent ministerial action. On the assumption, then, that there can be more than one "owner" of land who may be entitled to serve a purchase notice under the section, the next question to resolve is who can qualify under that description? The problem is, to my mind, an exceedingly difficult one, if only for the reason that according to ordinary conceptions there cannot be two different owners of the same property, unless one separates legal from beneficial interests, which there is no reason to suppose that the legislature had in mind.

Before turning to the definition of "owner" in section 119 of the Act it will be convenient to consider whether any light is thrown upon the meaning of the word by other sections in the same Part of the Act. The corporation relied on the fact that in certain sections (for example, sections 21, 22, 23, 24, 26, 27, 28, 29, 32 and 33) the word "owner" is coupled or contrasted with the occupier, other persons interested in the land, and (in some instances) other persons "affected." This difference in language was noted by the Divisional Court and the corporation contends that it suggests, as a matter of reasonable inference, that the legislature in section 19 was dealing with owners of land alone and not with persons who can claim to possess any kind of interest therein. It is true, I think, that the difference in language does indicate that section 19 was concerned with a narrower class of persons than that to which the other sections are directed; and that an occupier of land (for example) cannot serve a purchase notice under section 19 in his capacity *as such*. But the owner of land is none the less the owner because he occupies it himself, and the only assistance that I derive from the difference of language in the sections is the negative guidance that a tenant or other person interested in land (for example, a person who is entitled to a rentcharge) cannot proceed under section 19 unless he is an "owner" of the land as well.

The next question is whether the definition of "owner" in section 119 applies to the word as used in section 19. In considering this it is necessary, I think, to presume that either it applies universally to the section or it does not apply at all; for it does not seem to me to be a tenable proposition that it should be held applicable to some ownerships of land in connexion with the service of purchase notices but not to others. If this be right, there is strong ground for the view that the context of section 19 "otherwise requires" so as to exclude the section 119 definition. I will give two examples to demonstrate its inapplicability. (1) A, the owner of land in fee simple, lets to B for a term of three years in consideration of a premium but at a low rent. B sublets to C at a rack-rent. If the definition applies, B, and not A, is the owner of the land even when only a week or two remain of the term. (2) A, the owner as before, lets the land for 20 years to B, at less than a rack-rent. B sublets to C for the residue of the head term less the last day at a rack-rent and three more similar subleases subsequently follow, each at a rack-rent. Under the definition, B and each of the other sublessors are "owners" but A is not; and the only interests in the sterilized land which the local planning authority could be compelled to purchase would be the nominal leasehold reversions. I cannot believe that the definition is applicable to such cases as these and, if not, it is not, in my judgment, applicable to section 19 at all. It might be suggested further that the definition is only apt in cases where land is in the ownership of one person and not more and that for this reason also it is inapplicable to section 19, which envisages land which has more than one owner. I do not, however, think on the whole that this view is right. It is true that the words "is entitled to receive the" (not "a") "rack-rent" seem to indicate the payment and receipt of one rack-rent and no more, but on the other hand it is "a "person" and not "the person" who is in contemplation as receiving rack-rent. In my opinion, accordingly, the definition cannot be regarded as ousted from section 19 by this consideration alone.

If, then, the definition which is furnished by section 119 is to be disregarded, it is necessary to ascertain from other sources the meaning which "owner" was intended to have in section 19. On the views which I have already expressed, (1) there may be one or more "owners" of the same land, and (2) an occupier or a person having some other limited interest in the land is not, as such, an owner for the purposes of section 19; and, therefore, a tenant is not, merely by virtue of his tenancy, an owner. Apart from these guides to the legislature's intention in speaking of owners in the section there is the further consideration that section 19 is dealing with "sterilized" land. Taking these matters into account, it seems to me that whoever may or may not be an owner in special circumstances, the person in whom land is vested for an estate in fee simple, subject only to a lease, is prima facie "an" owner of the land. He is indeed, according to the ordinary signification of the term, "the" owner of the land; for, although a lessee is the owner of a legal interest in the land demised, namely, a term of years, he is not the owner of the land itself. There is nothing surprising in the owner of the freehold of land which has become sterilized being within the purview of the section, for in the general run of cases he is the person primarily affected by a refusal of permission to develop, and he is the only person affected in all cases in which he not only owns the land but occupies it himself. It may be that in the early days, at all events, of a long lease the lessee is "an "owner" of the land demised and entitled as such to serve a purchase notice; but even in such a case the freehold reversioner is still the owner of the land, and I can see no reason why he should be excluded from a provision which exactly describes him merely because the lessee is also given (on the suggested hypothesis) a similar status, and an equivalent right, himself.

I am therefore of opinion that the appellants, who were in fact the owners of No. 69, Ludgate Hill on September 1, 1952, were also "owners" for the purposes of section 19 of the Act and were entitled to serve their purchase notice accordingly. I would add that I think that the result would be the same even if one resorted to the definition of owner in section 119. On the assumption that the land was not let at a rack-rent on September 1, 1952, the "owner" as defined by section 19 would be the person who would be entitled to receive the rack-rent of the land if it were let at such a rent. The phrase "if it were so let," if taken by itself, appears to me to be at least as susceptible of meaning "if it had been so let" as "if it were to be so let." In *Truman, Hanbury, Buxton & Co.* v. *Kerslake* [6] the court adopted the latter construction, but I cannot accept that decision as deciding that it should be adopted in all cases, and I agree with the observations which my brethren have made upon that decision in their judgments in the present case, and in *Rawlance* v. *Croydon Corporation.*[7] In any event I am of opinion that in their application to sterilized land the words "if it were so let" can only reasonably mean "if it had been so let"; for a future letting of such land at a rack-rent (as ordinarily understood) would obviously be impracticable. If, on the other hand, the words do in fact mean "if it were to be so let" this would afford a further reason for rejecting the definition as being inapplicable to section 19.

Having regard to the views which I have indicated it is not necessary to arrive at any definite conclusion upon Mr. Heathcote-Williams' alternative argument to the effect that the property in question was in fact let at a rack-rent on the relevant date; I concur, however, in the views which my

---

[6] [1894] 2 Q.B. 774.

[7] [1952] 2 Q.B. 803.

C. A.
1953

REG.
v.
MINISTER OF HOUSING AND LOCAL GOVERNMENT.
Ex parte
CORPORATION OF LONDON.

Lord has expressed upon it. I agree that the appeal should be allowed.

Appeal allowed.
Leave to appeal to House of Lords,
conditional on payment of costs.

Solicitors: *Boxall & Boxall; Comptroller & City Solicitor; Solicitor, Ministry of Health; Solicitor, Ministry of Housing and Local Government.*

A. W. G.

C. C. A.
1953
Oct. 5, 19.

Lord Goddard C.J., Sellers and Havers JJ.

REGINA *v.* NEWLAND AND OTHERS.

Criminal Law—Conspiracy—Public mischief—Whether particulars of offence supported charge known to the law—Supply of pottery in United Kingdom — Fraudulent means — Purpose of statutory instrument defeated—Revenue—Tax avoidance scheme—Legality—Domestic Pottery (Manufacture and Supply) Order, 1947 (*S.R. & O.* 1947, *No.* 373)*—Domestic Pottery (Manufacture and Supply) (Amendment) Order,* 1948 (*S.I.* 1948, *No.* 1616).

Criminal Law—Practice—Trial—Several defendants—Separate summing-up and verdict against each—Jury allowed to disperse after each verdict—Propriety.

The appellants were convicted of conspiring to effect a public mischief and the particulars alleged that they conspired together by fraudulent means to obtain and by dishonest devices to distribute to the home market for eventual supply within the United Kingdom decorated domestic pottery which was not by reason of the Domestic Pottery (Manufacture and Supply) Order, 1947, or under any licence granted by the Board of Trade available for such supply, whereby the pottery was not available for sale for currency other than that of the United Kingdom. They appealed, first, on the ground that a charge of conspiracy to effect a public mischief was a crime not known to the law or, alternatively, that the particulars of offence did not support a charge known to the law; and, secondly, that the judge had been wrong in the procedure he adopted during the five-day summing-up by permitting the jury to disperse at night, when his method had been to deal separately with each appellant and take an immediate verdict after having dealt with him, without waiting to take all the verdicts at the end of the summing-up:—

Held, first, that in view of the decisions in *Rex* v. *Brailsford* [1905] 2 K.B. 730; 21 T.L.R. 727, *Rex* v. *Porter* [1910] 1 K.B. 369; 26 T.L.R. 200 and *Rex* v. *Bassey* (1931) 47 T.L.R. 222, it

---

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

was too late to object that a conspiracy to effect a public mischief was an offence unknown to the law, but that the offence of effecting a public mischief should be considered with caution for, if extended, it might enable judges to declare new offences which should be the business of the legislature. The right approach to public mischief cases was to regard them as part of the law of conspiracy; actions of an individual not committed in combination with others were indictable only if they constituted what in the past had been held to be a common law or statutory offence.

Rex v. *Manley* [1933] 1 K.B. 529; 49 T.L.R. 130 questioned.

Held, secondly, that if persons conspired to obtain a commodity for sale at home by false representations and documents when legislative enactments provided that it was only to be sold for export, those persons were using unlawful means to effect their purpose; and that whether the particulars of offence were regarded simply as disclosing a conspiracy to effect an unlawful purpose or whether they denoted a conspiracy by dishonest devices to defeat the clear intentions of an Act of Parliament or to work to the prejudice of a third party, i.e., the State, they disclosed offences known to the common law of this country.

Held, thirdly, that there could be no objection to the course taken by the judge in summing-up, and there was no reason why the jury should not be allowed to separate though the summing-up was concluded against one appellant and a verdict taken while the case remained part heard against the others, since in no case did the jury separate while considering a verdict.

APPEALS against convictions.

The appellants, Newland, Hawes, Dean, Blunt, C. M. Waight and G. E. Waight, were convicted before Glyn-Jones J. at the Central Criminal Court on an indictment containing 13 counts, but a verdict was only taken in respect of two counts. On the first count the statement of offence was "Conspiracy to effect "a public mischief," and the particulars of offence were that the appellants between May 1, 1947, and July 15, 1948, conspired together and with certain other persons not before the court by fraudulent means to obtain, and by dishonest devices to distribute to the home market, for eventual retail sale within the United Kingdom, decorated domestic pottery which was not by reason of the Domestic Pottery (Manufacture and Supply) Order, 1947,[1] or under any licence granted by the Board of Trade available for sale for currency other than that of the United Kingdom. The second count charged them with a similar conspiracy, the particulars referring to a later date and to an amending order of 1948 [2] as well as to the order of 1947. Some of the defendants were convicted on both counts, others only on the second, but for the purposes of the appeal the difference between the two counts was immaterial.

---

[1] The Domestic Pottery (Manufacture and Supply) Order, 1947, dated March 1, 1947, made by the Board of Trade under reg. 55 of the Defence (General) Regulations, 1939, kept in force by the Supplies and Services (Transitional Powers) Act, 1945, as continued, provides: "1. (1) No "manufacturer shall manufacture any "domestic pottery except under the "authority of a licence issued by the "Board of Trade under this para- "graph and in accordance with any "condition attached to that licence. "2. Except under the authority of a "licence issued by the Board of Trade

Decorated domestic pottery was obtained either from registered exporters or from manufacturers. The appellants were proved either to have given or to have been party to false declarations that the goods were wanted for export, and in addition to have given or been a party to giving their suppliers false shipping marks and in some cases false names of vessels on which the goods were to be shipped, or to have taken part in the disposal on the home market of the goods so dishonestly obtained. The goods in fact went to three firms who were registered but were proved to have been parties to the fraud with which the appellant Hawes was connected. The goods were taken to a wharf and then were distributed to firms controlled by the appellant C. M. Waight. Sales to retailers were effected by means of bogus documents and invoices falsely describing the goods as rejected or frustrated exports. The prosecution alleged that the appellants were thus enabled to dispose of decorated pottery to the value of £70,000, thus decreasing the total of that commodity available for export by that amount.

" under this article and in accordance " with any condition attached there" to, no manufacturer shall supply " any domestic pottery manufactured " by him other than undecorated " domestic pottery of a description " specified in the second schedule " hereto. 5. (1) The provisions of " this order except paragraph (1) of " article 1 shall not apply to the " manufacture or marking of domestic " pottery of any description intended " for supply, or to the supply of any " such goods,— . . . (b) to the holder " of an exporter's certificate issued for " the purposes of this article by the " Board of Trade, being a person who " when placing his order for the " goods endorsed it with the words " ' for export.' (2) A person referred " to in heading (b) of the preceding " paragraph shall not supply any " domestic pottery in respect of which " his order was endorsed ' for export ' " otherwise than by such exportation."

[2] Domestic Pottery (Manufacture and Supply) (Amendment) Order, 1948, made on July 13, 1948, amends arts. 5 (1) (b) and 5 (2) of the Order of 1947 to read as follows: " (b) to " a person who holds an exporter's " certificate issued for the purposes of " this article by the Board of Trade " and has surrendered a document, " signed and dated by him, clearly " indicating that he requires those " goods for export. (2) No person who " has acquired any domestic pottery by " virtue of the provisions of head (b) " of paragraph (1) of this article shall " supply that pottery except by such " exportation."

The appellant Newland appeared in person.

F. Ashe Lincoln Q.C. and *Kenneth Richardson* for Dean and Hawes. There is no such offence known to the law as that set out in the charge in this case. The doctrine of public mischief, at first very much restricted, has been gradually extended. If there is such an offence against an individual as well as the offence of conspiracy it means that there may be a number of offences which are undefined. If one begins from the premise that this is a doctrine which must be closely watched; then, where it is possible to charge persons with conspiracy at common law, they should be so charged. They should not under those circumstances be charged with public mischief.

[Lord Goddard C.J. If there is a conspiracy to avoid the provisions of a statute, are not the acts contrary to public policy and therefore public mischief?]

That proposition would be acceptable if a conspiracy to defraud had been added. But, as was said by Lord Tomlin in *Inland Revenue Commissioners* v. *Duke of Westminster*,[3] "every man "is entitled if he can to order his affairs so as that the tax attach-"ing under the appropriate Acts is less than it otherwise would "be."

The function of a judge and jury in public mischief cases is still somewhat at large. If the law is that it is for the judge to rule that acts done constitute a public mischief, then where the facts are admitted, as they were substantially in this case, the jury would have no function. If, however, as was suggested in argument in *Rex* v. *Manley*,[4] referring to Alverstone C.J. in *Rex* v. *Porter*,[5] it is for the judge to rule whether acts tend to a public mischief, then it would be for the jury to decide whether in fact they did so. The latter is the proper course, because otherwise the judge would be usurping the function of the jury.

The essential element in public mischief is damage to the public. The appellants were charged with public mischief because the prosecution could not say that they had contravened the regulations. [Reference was made to *Rex* v. *Brailsford*[6] and *Rex* v. *Porter*.[7]]

[Lord Goddard C.J. The regulations were made under the Defence (General) Regulations, 1939, and kept in force by the

---

[3] [1936] A.C. 1, 19; 51 T.L.R. 467.

[4] [1933] 1 K.B. 529, 533; 49 T.L.R. 130.

[5] [1910] 1 K.B. 369, 373; 26 T.L.R. 200.

[6] [1905] 2 K.B. 730; 21 T.L.R. 727.

[7] [1910] 1 K.B. 369.

Supplies and Services (Transitional Powers) Act, 1945, as continued. The judge said that if persons put their heads together to avoid the regulations that was against the statute and therefore a public mischief.]

That is where the difficulty arises, because the regulations do not state with what object they were passed. The charge stated that by reason of the conspiracy pottery was not available for sale for currency other than that of the United Kingdom. Neither the Act nor the regulations said that that was their object, and yet that was a matter of which the judge took judicial notice. If the essence of the alleged public mischief is that a person has deprived the country of foreign currency, then if two persons decide to sell a car here which could have been sold abroad that would be a public mischief. [*Rex* v. *Manley*[8] and *Rex* v. *Higgins*[9] were referred to.] It cannot be said that any act prejudicial to a class of subjects could be ipso facto indictable. It would be a serious extension of the law if, where two persons agreed to do something which was prejudicial to a class of the Queen's subjects, it would be an offence, e.g., if two persons in the stock market bought large blocks of shares.

[LORD GODDARD C.J. That would be an offence if it was done dishonestly.]

If the acts can constitute a conspiracy to defraud, then there is no need to invoke the doctrine of public mischief. [Reference was made to an article by Dr. Stallybrass in the Law Quarterly Review, vol. 49, p. 183.] Glyn-Jones J. did not direct the jury in the terms of *Rex* v. *Manley*.[10] He assumed that there were acts sufficient to constitute a public mischief and left it to the jury to decide whether the acts were actually done. Unless it can be shown that the acts done by the appellants were such as would sustain a common law conspiracy to defraud, merely that regulations have been circumvented does not of itself create an offence. [*Rex* v. *Bassey*[11] and *Rex* v. *Young*[12] were also referred to.] If a conspiracy to evade a statute is one which is not itself indictable as a conspiracy at common law, it cannot be made indictable merely by saying that it is a public mischief. The judge ruled that to deprive the country of foreign currency was a public mischief. The jury did not have an opportunity of considering the real charge.

With regard to the point of procedure, the judge should not have allowed the jury to separate while considering their verdicts: *Rex* v. *Neal.*[13] A finding of conspiracy against one person may involve a finding of conspiracy against another. When the jury found Waight, whose case was the first to be considered, guilty, they must have found the others guilty of conspiring with him when they had not heard the summing-up against them. The jury should have been asked whether they found all the accused guilty. As the jury were allowed to separate at the end of each day of the five-day summing-up the danger arises which arose in *Rex* v. *Neal.*[13] In those circumstances the procedure was irregular.

---

[8] [1933] 1 K.B. 529.

[9] (1801) 2 East 5.

[10] [1933] 1 K.B. 529.

[11] (1931) 47 T.L.R. 222.

[12] (1944) 30 Cr.App.R. 57.

Kenneth Richardson, for Blunt, associated himself with Mr. Ashe Lincoln's argument.

The appellants C. M. Waight and G. E. Waight appeared in person.

Eric Sachs Q.C., *Neville Faulks* and *David Hirst* for the Crown. Public mischief is the proper charge where widespread dishonesty to defeat a statute is alleged or where technically it does not matter if injury is done to an individual providing the public at large is injured. Here the appellants did, by means of false documents, what the regulations prohibited.

On the point of procedure, the court has a well-recognized discretion to allow a jury to return more than one verdict, and there is nothing in the Criminal Justice Act, 1948, which requires one to treat all verdicts as one. The fact that one of the accused persons was acquitted showed that it was a just verdict. If there was any irregularity it was in favour of the accused.

Ashe Lincoln Q.C. replied on the procedural point.

October 5. LORD GODDARD C.J. announced that the appeals would be dismissed, and that as they raised some interesting points of law the court would put its judgment into writing.

October 19. LORD GODDARD C.J., reading the judgment of the court, stated the facts and relevant statutory provisions as set out above, and continued:—The object of these Domestic Pottery Orders is clear enough and is designed to assist what is commonly known as the export drive. Decorated domestic pottery was a desirable and valuable export which could be sold in overseas markets and thus assist this country to obtain foreign exchange, and therefore it was desired to restrict or even prohibit the sale of this commodity on the home market so as to increase the amount available for export. No doubt this was a policy of the Government, but it was a policy authorized by Parliament as the Board of Trade were able to issue the regulations by virtue of the statute referred to therein. Parliament must also be taken to have approved the orders as no prayer was presented against them, and it has been recognized over and over again that statutory rules and orders, if intra vires the Act under which they are made, have exactly the same effect as though they were contained in the enactment itself. There has never been any suggestion that these orders were ultra vires. It is to be observed, and this is a matter of importance, that the orders in terms deal only with manufacturers or persons holding export certificates from the Board of Trade and who were referred to in the trade as registered exporters. They may only supply decorated pottery for export. The orders do not in terms deal with a person who obtains from a manufacturer or registered exporter these goods representing that they are for export and then, having obtained them, sells them on the domestic market. But it is obvious that if persons who falsely represent that they intend to export the goods and thereby obtain supplies of them could then with impunity sell the goods in this country, the whole scheme would break down and the object of the legislature would be defeated. Moreover, such conduct on the part of traders who set to work dishonestly by false and deceptive documents and devices to obtain and deal with goods contrary to the clear intention of the orders must work serious prejudice to the reputable members of the trade who are carrying on their business in accordance with the law. We may also say at once that it is no answer to the allegation that the defendants were acting fraudulently in this matter to say that the persons who supplied the goods in the circumstances of this case were not defrauded merely because they were paid the full invoice price. It is enough to show that they would not have acted as they did but for the false representations and dishonesty of the persons who obtained the goods for them. This is so clear that we do not propose to enlarge upon it.

---

[13] [1949] 2 K.B. 590; 65 T.L.R. 557; [1949] 2 All E.R. 438.

Two main grounds of appeal were taken on behalf of the appellants: first, that the charge of conspiracy to effect a public mischief was a crime not known to the law and, as an alternative, that at least the particulars of the offence did not support a charge known to the law. We will deal with this point before considering the second ground which related to a matter of procedure only. It is much too late to object that a conspiracy to effect a public mischief is an offence unknown to the law. There have been at least three reported cases during the present century in which that charge has been made and convictions upheld: *Rex* v. *Brailsford*,[1] *Rex* v. *Porter*[2] and *Rex* v. *Bassey*.[3] There is also *Rex* v. *Manley*,[4] in which there was a charge of effecting a public mischief but no charge of conspiracy, and we propose to consider that case entirely separately. The court is well aware of the caution with which they should approach the consideration of an offence which is alleged to consist of doing acts which tend to effect public mischief as, if extended, it might enable judges to declare new offences which should be the business of the legislature. The objections to such a course were forcibly pointed out by Sir Fitzjames Stephen, the most prominent institutional writer on the criminal law in the last century, in his History of the Criminal Law, vol. 3, p. 359.

We think that we may say that the court should approach the subject at least with the same degree of caution as must be exercised when considering a plea in a civil action that something has been done contrary to public policy. Indeed, nowadays we know that matters which are to be regarded as contrary to public policy, as, for instance, to invalidate a contract, must be found in cases decided in the past and no additions are now to be made. No one has ever attempted to define what may or may not constitute a public mischief and we have certainly no desire to increase the number of criminal offences by adding to the category of misdemeanors. But there are two points which in our opinion do not make it necessary for us to consider whether there is here any attempt to create a new offence. In the first place it is well known that there may be many acts which if done by an individual would not be indictable, or even actionable as a tort, and yet may become both actionable and criminal if done by a combination of persons as the result of a conspiracy, and for this really elementary proposition we need only refer to *Quinn* v. *Leathem*.[5] Many other illustrations are to be found both in the old and in the more modern reports: *Vertue* v. *Lord Clive*,[6] *Clifford* v. *Brandon*,[7] the note of *Reg.* v. *Leigh*,[8] *Mogul*

---

[1] [1905] 2 K.B. 730; 21 T.L.R. 727.

[2] [1910] 1 K.B. 369; 26 T.L.R. 200.

[3] (1931) 47 T.L.R. 222.

[4] [1933] 1 K.B. 529; 49 T.L.R. 130.

[5] [1901] A.C. 495; 17 T.L.R. 749.

[6] (1769) 4 Burr. 2472.

[7] (1809) 2 Camp. 358.

[8] (1843) 1 C. & K. 28.

Steamship Co. Ld. v. *McGregor, Gow & Co.*,[9] and *South Wales Miners' Federation* v. *Glamorgan Coal Co. Ld.*[10] A conspiracy consists of agreeing or acting in concert to achieve an unlawful act or to do a lawful act by unlawful means. Can anyone doubt that if persons conspire to obtain a commodity for sale in this country by false representations and fraudulent documents when legislative enactments provide that except under licence it is only to be sold for export they are not using unlawful means to effect the end in view?

Secondly, in Hawkins' Pleas of the Crown (vol. 1 at p. 446), a work of great authority, it is stated: ". . . there can be no doubt " but that all confederacies whatsoever, wrongfully, to prejudice " a third person, are highly criminal at common law; as where " divers persons confederate together by indirect means to " impoverish a third person. . . ." This passage was quoted in the judgment of Fry L.J. in *Mogul Steamship Co. Ld.* v. *McGregor, Gow & Co.*,[11] and that judgment is very much in point in this case. He was dealing with indictable conspiracies and referred to *Rex* v. *Sterling*.[12] He quoted the explanation of that case given by Holt C.J. in *Reg.* v. *Daniell*,[13] that the real ground of the decision was that the offence of the defendants, that is the conspiracy, " was directly of a public nature, and levelled at the " Government " and that is exactly the case here. The third person injured and impoverished here is the state or, as Holt C.J. called it, the Government. The statement of offence in both the counts in the present case might have consisted simply of conspiracy to commit a common law misdemeanor and the particulars thereunder plainly show the constituents.

In upholding these convictions therefore we are in no way creating a new offence. The particulars sufficiently allege a common law misdemeanor, namely conspiracy, and whether the matter is looked at simply as a conspiracy to effect an unlawful purpose or a conspiracy by dishonest devices to defeat the clear intention and purpose of an Act of Parliament or to work to the prejudice of the State in our opinion they disclose offences which have long been known to the common law of this country. Mr. Ashe Lincoln tried to compare this case to one in which persons devised plans for avoiding surtax or death duties, and quoted Lord Tomlin's well-known dictum in *Inland Revenue*

---

[9] (1889) 23 Q.B.D. 598; 5 T.L.R. 658.

[10] [1905] A.C. 239; 21 T.L.R. 441.

[11] 23 Q.B.D. 598, 630, 631.

[12] (1663) 1 Lev. 126; 1 Sid. 174.

[13] (1704) 6 Mod. 99, 100.

Commissioners v. *Duke of Westminster*.[14] But the cases are in no sense analogous. What Lord Tomlin laid down was that if a man can order his affairs so that the tax attaching under the particular Acts was less than it otherwise would be then however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers might be of his ingenuity he cannot be compelled to pay the increased tax. But in that case the taxpayer had done nothing dishonest, nothing false, nothing deceptive. The only question in the case was as to the legal effect of certain admittedly genuine deeds; they were held to create an obligation to pay annuities, not salary or wages and consequently the taxpayer was entitled to deduct the payments in arriving at the total income for surtax purposes. Openly and without fraud of any kind he had become entitled to certain deductions from his income.

We cannot leave this part of the case without referring to *Rex* v. *Manley*,[15] a case binding on this court though it has been subject to considerable criticism. The facts were that the defendant, a woman, had given false information to the police that she had been assaulted and robbed thereby causing officers of the police to waste their time investigating a bogus crime and exposing individuals answering to the description of the pretended robber to suspicion. In upholding the conviction this court held that such conduct amounted to a misdemeanor, namely effecting a public mischief. They were relying on a dictum of Lawrence J. in *Rex* v. *Higgins*,[16] as well as on *Rex* v. *Brailsford*[17] and *Rex* v. *Porter*.[18] The dictum in *Rex* v. *Higgins*[19] was that all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the public are indictable, but no other member of the court stated the law in such wide terms. It is the breadth of that dictum that was so strongly criticized by Sir Fitzjames Stephen in the passage in his History of the Criminal Law to which we have already referred and also by Dr. Stallybrass in the Law Quarterly Review, vol. 49, p. 183. In effect it would leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanor. However beneficial that might have been in days when Parliament met seldom or at least only at long intervals it surely is now the province of the legislature and not of the judiciary to create new criminal offences. The Council, or as it was more generally termed, the Court of Star Chamber in its time rendered considerable service to the criminal law by declaring some matters, notably perjury, to be misdemeanors though they never attempted to create new felonies. But conditions now are wholly different. The actual decision in *Rex* v. *Higgins*[19] was that an incitement to commit a felony was a misdemeanor. The court showed that it was firmly established by decisions that an attempt to commit a misdemeanor was in itself a misdemeanor and applied that doctrine to attempts to commit felony and held that the solicitation was in itself an act sufficient to prevent the application of the doctrine that mere intention unaccompanied by some act would not support an indictment for an attempt. No one would criticize the actual decision, but the very wide dictum to which we have referred is unnecessary to support it. The short judgment in *Rex* v. *Manley*[20] while referring to *Rex* v. *Brailsford*[21] and *Rex* v. *Porter*[22] apparently overlooked or at any rate makes no mention of what in our opinion was an all-important factor in those cases, namely that in both there was a charge of conspiracy. With all respect to a case which, as we have said, is binding on us we believe that the right approach to what may be compendiously called public mischief cases is to regard them as part of the law of conspiracy, and to hold the actions of an individual not committed in combination with others as indictable only if they constitute what has been held in the past to be common law or statutory offences. It may be that *Manley's* case[23] will some day be considered by the House of Lords and in any case we venture to think that it would be a useful reform if such conduct as was there disclosed were made a summary offence by the legislature. We need not further enlarge on it, as the charge we are now considering was one of conspiracy, except to say that in our considered opinion the safe course is no longer to follow it.

---

[14] [1936] A.C. 1, 19, 20; 51 T.L.R. 467.

[15] [1933] 1 K.B. 529.

[16] (1801) 2 East 5.

[17] [1905] 2 K.B. 730.

[18] [1910] 1 K.B. 369.

[19] 2 East 5.

We now pass to the second ground of appeal. What is challenged is the action which the judge took in summing up the case. He started his summing-up, with all the appellants in the dock, by giving the jury a general outline of the case and a charge on the law, and no fault is found with his direction. He then proceeded to deal with the case of each appellant separately and took separate verdicts thereon. For instance, he first dealt with the case of Clifford Waight, and having summed up the evidence

---

[19] 2 East 5.

[20] [1933] 1 K.B. 529.

[21] [1905] 2 K.B. 730.

[22] [1910] 1 K.B. 369.

[23] [1933] 1 K.B. 529.

C. C. A.
1953

REG.
v.
NEWLAND.

with regard to that appellant he sent the jury out to consider their verdict against him. When the jury returned with a verdict of Guilty that appellant was sent down and the judge started to sum up the evidence against the second appellant, again taking a separate verdict, and so on against all of them. His summing-up occupied altogether five days and at the conclusion of each day the jury were allowed to separate and to come back the following morning. They in no case separated while they were considering a verdict. We can see no objection in law to the course which the judge took. It was no doubt unusual but so also was the case. It had taken the better part of six weeks to try, a mass of documents had to be considered and the case was one of great complexity. To have thrown, so to speak, the whole of the case at the jury, leaving them to sort out afterwards the evidence against each appellant, would have been neither in the interests of the appellants themselves nor in the interests of justice. It was part of the judge's duty to remind the jury that they would have to consider the case of each man separately. It would have been impossible for the jury to have done so with a case of this description except by the course which the judge took. It was objected that this offended against the decision in *Rex* v. *Neal*,[24] but in our opinion that case has no application to what happened here. In *Neal's* case [24] the recorder, having concluded his summing-up and enclosed the jury in charge of the bailiff, allowed them to separate and go out into the town for refreshment. The court felt obliged to hold that that was so contrary to established practice that the conviction could not be allowed to stand, applying the words of Lord Sumner in *Crane* v. *Director of Public Prosecutions* [25] that to deprive an accused person of the protection given by essential steps in criminal procedure leaves the court no option but to quash the conviction. But what was done here amounted to no more than this: when the judge had summed up against the first appellant and taken the verdict the case was still part heard against all the other defendants and so it remained against each defendant until a verdict had been taken against all of them. It is well known nowadays that judges very often break off their summing-up to enable the jury to obtain refreshment, or if it has become late to let them go home and consider the verdict fresh next morning, though it may be that very little remains to finish the summing-up. Once the summing-up is finished and the jury enclosed they must not be allowed to separate, but we

---

[24] [1949] 2 K.B. 590; 65 T.L.R. 557; [1949] 2 All E.R. 438.

[25] [1921] 2 A.C. 299, 331; 37 T.L.R. 788, sub nom. *Rex* v. *Crane*.

C. C. A.
1953

REG.
v.
NEWLAND.

can see no reason why the jury should not be allowed to depart at night, though the summing-up is concluded and a verdict taken against one, while the case still remains part heard against the others. In our opinion there is nothing in this objection.

Appeals dismissed.

Solicitors: *Randolph & Dean; Freeborough & Co.; Solicitor, Board of Trade.*

[COURTS-MARTIAL APPEAL COURT.]

REGINA *v.* PAGE.

C.-M. A. C.
1953
Oct. 26;
Nov. 10.

Lord Goddard C.J., Havers and Glyn-Jones JJ.

Court-Martial—Jurisdiction—Murder—Alien killed abroad by British soldier—Power of court-martial to try for murder—Queen's peace—Offences against the Person Act, 1861 (24 *&* 25 *Vict. c.* 100), *s.* 9—*Army Act,* 1881 (44 *&* 45 *Vict. c.* 58 (*as amended and re-enacted*)), *s.* 41.

A British soldier killed an Egyptian national in Egypt and was convicted of murder by a court-martial:—

Held, that the effect of section 9 of the Offences against the Person Act, 1861, and section 41 of the Army Act [1] was that a

---

[1] Army Act, s. 41: "Subject to "such regulations for the purpose "of preventing interference with the "jurisdiction of the civil courts as are "in this Act after mentioned, every "person who, whilst he is subject to "military law, shall commit any of "the offences in this section mentioned "shall be deemed to be guilty of an "offence against military law, and if "charged under this section with any "such offence (in this Act referred to "as a civil offence) shall be liable to "be tried by court-martial, and on "conviction to be punished as follows; ". . . (1) If he is convicted of treason, "be liable to suffer death, . . . ; and "(2) If he is convicted of murder, be "liable to suffer death; . . . and (3) If "he is convicted of manslaughter or "treason-felony, be liable to suffer "penal servitude, . . . ; and (4) If he "is convicted of rape, be liable to "suffer penal servitude, . . . ; and "(5) If he is convicted of any offence "not before in this section particularly "specified, which when committed in "England is punishable by the law "of England, be liable, whether the "offence is committed in England "or elsewhere, either to suffer such "punishment as might be awarded "to him in pursuance of this Act in "respect of an act to the prejudice of "good order and military discipline, or "to suffer any punishment assigned "for such offence by the law of "England. Provided that a person subject to military law shall "not be tried by court-martial for "[any of the five specified offences] "committed in any place within Her "Majesty's dominions, other than "the United Kingdom and Gibraltar, "unless such person at the time he "committed the offence was on active "service, or such place is more than "one hundred miles . . . from any "city or town in which the offender "can be tried for such offence by a "competent civil court."

C.-M. A. C.
1953

REGINA
v.
PAGE.

person subject to military law could be tried for murder by court-martial abroad whoever the victim and wherever the offence was committed.

APPEAL against conviction.

The appellant, Harry Richard Page, an acting corporal in the Royal Corps of Signals, was tried and convicted by a General Court-Martial assembled at Fayid, in the Suez Canal Zone, for the murder of an Egyptian national in an Egyptian village. His appeal from that conviction raised the question of law that the conviction could not stand for the reason that the murdered man was not within the Queen's peace.

Kenneth Diplock Q.C. and *J. M. Buckland* for the appellant. The point of law raised by this appeal is whether a court-martial has jurisdiction to try for murder a British subject who kills an alien abroad in circumstances which would amount to murder if the killing were done in this country. The appellant's conviction was bad in law because the murdered man was not within the Queen's peace. The success of the appeal depends on three propositions: first, that the killing outside the Queen's dominions is not murder at common law unless both the killer and his victim are British subjects; secondly, that if on their true construction section 9 of the Offences against the Person Act, 1861, and its predecessor, the Act of 9 Geo. 4, c. 31, gave to criminal courts in this country the power to punish as if it were murder the killing of aliens abroad by British subjects outside the Queen's peace, they nevertheless did not extend the common law definition of murder; and thirdly, that the expression "murder" in section 41 of the Army Act means the crime of murder at common law.

As regards the first proposition, the essence of a crime is that it is an act for which the Crown asserts the right to punish through its appropriate judicial organ. It is necessary to distinguish between the Crown's right to punish irrespective of the judicial organ through which it does so and the particular court through which that right is exercised. Prima facie, the Crown does not assert the right to punish British subjects for an offence committed outside the Queen's dominions: it is only exceptionally in serious crimes, such as murder and manslaughter, that the Crown asserts an extended right to punish crimes committed outside the Queen's dominions. The general principle appears from *Attorney-General for Colony of Hong Kong* v. *Kwok-a-Sing*.

---

[2] (1873) L.R. 5 P.C. 179.

It is conceded that by Coke's day the Crown asserted a right to punish the act of killing if the victim was under the King's protection and the killer owed allegiance to the Crown. The definition of murder in the third volume of Coke's Institutes, p. 47, is: "Murder is when a man of sound memory, and of the "age of discretion, unlawfully killeth within any county of the "realm any reasonable creature . . . under the King's peace, with "malice fore-thought." There were two qualifications: "in any "county of the realm," which goes to venue; and "under the "King's peace"—the quality which the victim must have—goes not to venue but is a necessary ingredient of the act of murder. Only the killing abroad of a British subject by a British subject would be included in the expression "under the King's peace."

After the Court of the Constable and Marshalls had become obsolete the Act 33 Hen. 8, c. 23, gave commissioners power to try murders committed outside the King's dominions. That Act merely provided a venue for common law crimes of murder whether they were committed within or without the King's dominions: it did not purport to enlarge the crime of murder, but merely concerned judicial process; and the numerous trials under that Act for murder committed outside the realm were all cases where one British subject had killed another: *Rex* v. *Sawyer.*[3] The old authorities are cited in *Rex* v. *Depardo.*[4]

On the second proposition—that the Act of 1861 did not extend the common law definition of murder—it is necessary to look at the earlier Act of 1828 (9 Geo. 4, c. 31), which represented a new departure in English legislation. It provided that if any of His Majesty's subjects should be charged in England with any murder committed on land out of the United Kingdom, whether within the King's dominions or without, it should be lawful for any justice of the peace of the county or place where the person so charged should be to take cognizance of the offence so charged and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction. At first the courts took the more limited construction of that section and construed the word "murder" as meaning any act which, if committed within the county or place, would have been murder: see *Rex* v. *Helsham.*[5] That view, however, did not continue to prevail, as appears from *Reg.* v. *Azzopardi,*[6] where it was held that a British subject who murdered in a foreign country a person who was not a British subject was triable in England. The reason for the decision in *Azzopardi's* case[6] is explicable because the Act of 1828, unlike the earlier Acts, contained the words "as if the "same had been committed within the limits of his ordinary "jurisdiction."

---

[3] (1815) Russ. & Ry. 294; 2 C. & K. 101.

[4] (1807) 1 Taunt. 26.

[5] (1830) 4 C. & P. 394.

[6] (1843) 1 C. & K. 203.

The Offences against the Person Act, 1861, repeated that section almost word for word, but with the additional qualification "whether the person killed was a subject of Her Majesty or not." The result of those Acts was to give jurisdiction to the criminal courts to try an offence committed abroad which was not murder at common law: it did not extend the meaning of "murder" at common law, but created an offence unknown to the common law.

As regards the third proposition, the expression "murder" in section 41 of the Army Act means murder at common law and not the extended statutory meaning. Paragraph 5 of the section by necessary implication excludes murder from the list of offences which, if committed in England, would have been punishable by the ordinary civil jurisdiction.

Sir Reginald Manningham-Buller Q.C., S.-G., and *E. Garth Moore* for the Crown. The appellant's interpretation of the expression "under the Queen's peace" is incorrect. The decisions in *Rex* v. *Sawyer*[7] and *Rex* v. *Helsham*[8] in no way affect the meaning of "murder." They were both cases in which the argument turned, not on the question what were the necessary ingredients of the offence of murder, but on what was the intention of Parliament in passing the Act of Henry VIII. Neither is an authority for the proposition that "murder" bears a different meaning in different Acts, or that the definition of murder excludes the killing of an alien abroad.

In Coke's time the King's peace would cover any county of the realm, and it is submitted that the words "under the Queen's "peace" do not merely mean "within the realm," but refer to persons unlawfully carrying arms against the Queen. "Under "the Queen's peace" means no more than that the killing of the Queen's enemies in the course of military operations is not unlawful. The best definition of "the Queen's peace" is in Kenny's Outlines of Criminal Law (1952 ed.), p. 102: "The crime "of homicide may be committed upon any human being who is "within the King's peace. Accordingly if even an alien enemy, "being within the realm, is killed otherwise than in the actual

---

[6] 1 C. & K. 203.

[7] Russ. & Ry. 294; 2 C. & K. 101.

[8] 4 C. & P. 394.

"course of an operation of war the killing may be as much murder "as the killing of an Englishman."

Diplock Q.C. replied.

Oct. 26. LORD GODDARD C.J. announced that the appeal would be dismissed and that the court would give their reasons later.

Nov. 10. LORD GODDARD C.J. We have already dismissed this appeal and now proceed to give our reasons.

The appellant, an acting corporal in the Royal Corps of Signals, was tried and convicted by a General Court-Martial assembled at Fayid, in the Suez Canal Zone, for the murder in an Egyptian village of an Egyptian national. He was sentenced to death and the sentence was commuted by the confirming officer to one of imprisonment. There was abundant evidence to justify the conviction, and the summing-up of the judge-advocate is not open to criticism, apart from his citation of a passage in the Manual of Military Law which we will consider later in this judgment. The appellant was granted leave to appeal by a single judge of this court on a question of law, namely, that the conviction could not stand for the reason that the murdered man was not within the Queen's peace. The argument submitted by Mr. Diplock on his behalf was that the common law definition of murder is that stated in Coke's Institutes, Third Part, chapter 7, p. 47, where he said: "Murder is when a man of sound "memory, and of the age of discretion, unlawfully killeth within "any county of the realm any reasonable creature in rerum "natura under the King's peace, with malice fore-thought. . . ." Mr. Diplock contended that a court-martial could only try a case of murder if it came within this common law definition, and could not try one in which recourse had to be made to statutory provisions which had made murder committed abroad triable and punishable in this country.

As will be seen hereafter, the case really depends on the true construction of section 41 of the Army Act. In view of the fact that section 9 of the Offences against the Person Act, 1861, provides that where any murder is committed by any subject of Her Majesty on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed is the subject of Her Majesty or not, then the offence may be dealt with in all respects as if it had been committed in England in any county or place where the suspected person is apprehended or is in custody, it is not strictly necessary for the purposes of this case to consider the old law on the subject. All that it is necessary to ascertain is whether the law as now laid down in that section can be applied by a court-martial. In deference, however, to Mr. Diplock's learned and careful argument we will consider shortly the position as it was before that statute.

It is no doubt true that the general rule of English law is that offences committed by British subjects out of England are not punishable by the criminal law of this country. We need not explore the origin of this doctrine. Suffice it to say that it depends partly on the law of nations, which would regard an offence committed on the soil of one nation as at least primarily the concern of the sovereign of that country; but one can also see the procedural difficulty which would have occurred to a medieval lawyer who would be unable to understand how the jury consisting of persons taken from the vicinage could have knowledge of crimes committed abroad sufficient to present them to the sovereign's courts. It is enough to say that certainly from the reign of Henry VIII this rule has been subject to statutory exceptions. Crimes of the present day which, though committed abroad, can be tried in England, are treason, homicide, bigamy and offences against the Foreign Enlistment Act, and there may be others, but these instances will suffice.

The first Act concerning a crime committed abroad was, we believe, 33 Hen. 8, c. 23. This enabled persons charged with treason or murder to be tried in any county in whatsoever shire or place within the King's dominions or without the offence was considered to be committed. It is curious that although Coke in his definition speaks of a killing within any county of the realm he makes no mention of this statute. We can find no reference to the Act in the chapter on murder, or any observations about the possibility of trying a person in this country for a murder committed abroad. In our opinion this lends considerable force to the view which has often been advanced in arguments in cases on this subject, and by some text writers, that his reference to the King's peace in his definition is meant only to except from murder killing in the course of war and, possibly, rebellion.

That Act was considered in *Rex* v. *Sawyer*,[1] but a much fuller report appears in a note to *Reg.* v. *Serva*.[2] The prisoner there was indicted for the murder of a woman in Portugal who was said to have been " in the peace of our God and our Sovereign " Lord the King." The argument which took place was on the sufficiency of the indictment, which it was said should have contained an averment that both the prisoner and the victim were British subjects. The case was reserved for the consideration of the 12 judges, and in delivering their opinion Le Blanc J. said [3]: " As to the second objection, that it is not alleged that " they were British subjects, the statute 33 Hen. 8, c. 23, " nowhere requires that; but, taking it that the jurisdiction only " extended to British subjects, the judges are of opinion that " sufficient is stated on the indictment to put the other party on " shewing the contrary. It states the deceased to be in the peace " of our Lord the King, and that the offence was against his " peace." But it is to be observed that they gave no opinion whether if the deceased had not been a British subject the conviction would have been bad, though it seems that their view was to the contrary by the reference to the statute of Henry VIII. It is also to be observed that in the course of the argument Lord Ellenborough said [4]: " ' Against the peace of the King ' applies " to the offender: it relates to his capacity to commit the crime." That, of course, is entirely intelligible. Nobody would suggest that an English court could try an alien for an offence not committed on British soil.

---

[1] (1815) Russ. & Ry. 294.

[2] (1845) 2 C. & K. 53, 101.

That case was heard in 1815, and in 1828 was passed the Offences against the Person Act of that year, which provided for the " trial of any of His Majesty's subjects charged in England " with murder committed on land out of the United Kingdom " whether within the King's Dominions or without." Now it is true that in *Rex* v. *Helsham*,[5] Bayley J., after conferring with Bosanquet J., directed an allegation that the prisoner and the deceased were subjects of His Majesty to be inserted in the bill. There was no judgment as to the necessity of the allegation that the deceased was a British subject, and the note of the summing-up only shows that it was left to the jury to say whether they were satisfied that the prisoner was a British-born subject. On the other hand, in 1843 in *Reg.* v. *Azzopardi*,[6] the prisoner, a British subject being a native of Malta, murdered a Dutch woman in Smyrna. He was tried in this country, and the objection was taken that the victim was a foreigner, but the conviction was affirmed. It was no doubt to allay any doubts that there may have been on this subject that section 9 of the Offences against

---

[3] 2 C. & K. 113.

[4] Ibid. 112.

[5] (1830) 4 C. & P. 394.

[6] (1843) 1 C. & K. 203.

C.-M. A. C.

1953

REGINA
v.
PAGE.

the Person Act, 1861, is in the wide terms to which we have already referred. It is therefore abundantly clear—and, indeed, Mr. Diplock admitted—that had the appellant been brought to this country and tried here the question as to the nationality of the victim could not have arisen. We have no doubt that when the word " murder " is found in a statute it has the meaning which has always been attached to it throughout the ages, namely, an unlawful killing with malice aforethought.

Section 41 of the Army Act is in these terms. [His Lordship read the section and continued:] The object of the proviso to the section and, indeed, of the regulations as mentioned in the first part of the section, is to ensure that persons charged with these grave offences shall be tried when possible by a civil court and not by a court-martial. It is to prevent any conflict of jurisdiction between civil and military courts. In our opinion the plain meaning of the section is that a court-martial can try a person subject to military law for any offence wherever committed which would be an offence against the law of England, subject only to this, that the section provides for the trial of the prisoner before a civil court instead of a court-martial in the circumstances set out in the section and regulations.

Our attention has been called to passages in chapter 6 of the Manual of Military Law, pp. 131–132 of the 1951 edition. It is there stated that it must be proved in the case of murder that the victim was under the Queen's peace and that the Army carries the Queen's peace with it wherever it goes. So far as this may appear to assert that an alien who is not at the time of the crime within Her Majesty's dominions or territories is within her peace we cannot assent to it, at least unless the territory has been effectively occupied by her forces. Nevertheless, the legislation to which we have referred enables a subject of Her Majesty to be tried and punished in the courts of this country or, if subject to military law, by a court-martial abroad, for murder whoever the victim and wherever committed. Coke's definition of murder applies to those cases which were triable in the common law courts of his day, namely, where murder was committed within the realm, though we have already pointed out that that very learned person had strangely enough omitted to notice the statute of Henry VIII.

Appeal dismissed.

Solicitors: *Registrar, Courts-Martial Appeal Court; Director, Army Legal Service.*

S. C.

1953
Oct. 13;
Nov. 6.

Lord Goddard C.J., Sellers and Havers JJ.

CHINA *v.* HARROW URBAN DISTRICT COUNCIL.

Limitation—Rating—Recovery of general rate—Issue of distress warrant more than six years after accrual of general rate—"Action to "recover any sum recoverable by virtue of any enactment"—"Action"—"Proceeding in a court of law"—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2 (1), 31 (1).

By section 2 (1) of the Limitation Act, 1939, "The following "actions shall not be brought after the expiration of six years from "the date on which the cause of action accrued . . . (*d*) actions to "recover any sum recoverable by virtue of any enactment. . . ." By section 31 (1), "In this Act, unless the context otherwise "requires . . . 'Action' includes any proceeding in a court of "law. . . ."

In 1940 the appellant was £31 4s. 1d. in arrears for rates on a hereditament occupied by him until July 5, 1940, when he left the premises and was engaged on war service. No action was taken by the rating authority until February 11, 1953, when they made a further demand for payment. The appellant refused to pay and, on March 18, 1953, the rating authority applied to the justices for a distress warrant. The appellant relied on section 2 (1) (*d*) of the Limitation Act, 1939, but the justices were of the opinion that recovery of the general rate was not by action within the meaning of that section and issued a distress warrant. On appeal:—

Held, that the definition of "action" contained in section 31 (1) of the Act showed that it was intended to bring within the scope of section 2 proceedings to which the term "action" in its ordinary sense would be inapplicable; that, although no action lay for the recovery of rates (*Liverpool Corporation* v. *Hope* [1938] 1 K.B. 751; 54 T.L.R. 425; [1938] 1 All E.R. 492), justices, when issuing a distress warrant for their recovery, were acting judicially (*Potts* v. *Hickman* [1941] A.C. 212; 57 T.L.R. 155; [1940] 4 All E.R. 491) in a matter in which the elements of a proceeding in a court of law were present; and that such proceeding was within the ambit of the section. The term "action" embraced "proceedings," and the words "cause of action" in section 2 must be read as "cause of "proceedings," and, as a demand for rates and a subsequent default was a necessary preliminary to an application for a distress warrant for rates, the cause of proceedings in such a case was the failure to pay on demand; time, therefore, ran from the demand. In the present case more than six years had expired since the original demands and the appellant, accordingly, had a good defence under the statute.

Per Lord Goddard C.J. The very wide words of the definition showed that section 2 was intended to apply to all money claims made in a court, and indicated that the legislature meant to bring every class of litigation, except penal actions, before whatever tribunal it might come within the ambit of the statute.

CASE STATED by Middlesex justices sitting at Wealdstone.

On March 18, 1953, a complaint was preferred by the respondents, the Harrow Urban District Council, against the appellant that he being a person duly rated and assessed to the general rate for the rating area of the Harrow Urban District Council was in arrear in the sum of £31 4s. 1d. and had not paid the same or any part thereof but had neglected or refused so to do.

The following facts were proved or admitted before the justices: The respondents were duly constituted under the provisions of the Local Government Act, 1894, and were a rating authority for the purposes of the Rating and Valuation Act, 1925. The general rate for the year 1940/41 was duly made and published, and the appellant was rated for the half year ending September 30, 1940, in the sum of £8 9s. 2d. in respect of premises then occupied by him. At that time the appellant was in arrear in the sum of £26 15s. 4d. in respect of general rates for previous half years. On July 5, 1940, the appellant ceased to be liable for future rates in respect of the premises, and in consequence was only liable for a proportion, namely, £4 8s. 9d., of the half year's rate in respect of the period of his occupation of the premises from April 1, 1940, to July 5, 1940. For various reasons, including the fact that the appellant was engaged on war service and that thereafter the respondents had no knowledge of his whereabouts, no further action was taken to recover the £31 4s. 1d. due, until February 11, 1953. On that date a further demand for payment was made on the appellant, who neglected and refused to pay.

On behalf of the appellant it was contended that the general rate was a sum recoverable by virtue of an enactment and that by virtue of section 2 (1) (*d*) of the Limitation Act, 1939,[1] it was not recoverable after the expiration of six years from the publication of the rate and that, therefore, the respondents' application for the issue of a distress warrant must fail.

On behalf of the respondents it was contended that the duties of justices upon an application to them for the issue of a distress warrant in respect of arrears of rates were ministerial, that an

---

[1] Limitation Act, 1939, s. 2: "(1) "The following actions shall not be "brought after the expiration of six "years from the date on which the "cause of action accrued, that is to "say:—(*d*) . . . actions to recover "any sum recoverable by virtue of "any enactment, other than a penalty "or forfeiture. . . . (4) An action shall "not be brought upon any judgment "after the expiration of twelve years "from the date on which the judg"ment became enforceable. . . ."

" action " was defined in section 31 [2] of the Limitation Act, 1939, as being any proceeding in a court of law, and that since the duties of justices in those circumstances were ministerial they did not constitute a court of law and, therefore, the Limitation Act, 1939, did not apply and a distress warrant should be issued.

The justices were of the opinion that their duties when sitting on applications for the recovery of rates were judicial having regard to *Potts* v. *Hickman*,[3] but that, having regard to *Danby* v. *Watson* [4] and *Liverpool Corporation* v. *Hope*,[5] the recovery of the general rate was not by action within the meaning of the Limitation Act, 1939, and that the position remained as it was before 1939 with no limitation of time on the recovery of the general rate. They accordingly issued a distress warrant. The appellant appealed.

Aron Owen for the appellant. There is no authority on the question whether any period of limitation is applicable to proceedings for the recovery of rates, but it is submitted that, by virtue of the definition of " action " in section 31 of the Limitation Act, 1939, as including " any proceeding in a court of law," such proceedings are an action " to recover any sum recoverable by " virtue of any enactment " within the meaning of section 2 (1) (*d*) of the Act and are therefore subject to the six-year period of limitation imposed by that subsection. The opinions of textbook writers vary on this subject; the cases cited in Ryde's Law and Practice of Rating, 9th ed. (1950), p. 817, do not appear to be authority for the proposition that no period of limitation applies to the recovery of rates. In *Gill* v. *Mellor* [6] the question of limitation did not arise. *Overseers of East Dean* v. *Everett* [7] is not in point, and *Reg.* v. *Blenkinsop* [8] decided only that a demand need not be made in the same year as that in which the rate is made.

No action lies for the recovery of rates; the only remedy is that of distress: *Danby* v. *Watson* [9]; *Liverpool Corporation* v. *Hope*.[10] That does not mean, however, that an application for a distress warrant in respect of arrears of rates is not a " proceeding " in a court of law " and within the definition in section 31. It is clear that justices when granting a warrant for distress are acting judicially, not ministerially: *Potts* v. *Hickman.*[11] The contrary view expressed by Cockburn C.J. in *Reg.* v. *Price* [12] cannot now stand in view of the decision in *Potts* v. *Hickman* [13]; see, in particular, the observation of Lord Wright that[14] the dictum of Cockburn C.J. in *Reg.* v. *Price* [15] that justices act ministerially " cannot as a statement of the general law be supported."

---

[2] Limitation Act, 1939, s. 31: " (1) " In this Act, unless the context other- " wise requires . . . ' Action ' includes " any proceeding in a court of law, " including an ecclesiastical court."

[3] [1941] A.C. 212; 57 T.L.R. 155; [1940] 4 All E.R. 491.

[4] (1877) 46 L.J.M.C. 179; 41 J.P. 406.

[5] [1938] 1 K.B. 751; 54 T.L.R. 425; [1938] 1 All E.R. 492.

[6] [1924] 1 K.B. 97; 40 T.L.R. 30.

[7] (1861) 3 E. & E. 574; 30 L.J. M.C. 117.

[8] [1892] 1 Q.B. 43.

[9] 46 L.J.M.C. 179; 41 J.P. 406.

[10] [1938] 1 K.B. 751; 54 T.L.R. 425; [1938] 1 All E.R. 492.

There must have been a demand for rates before any proceedings for recovery can be taken; the demand and other matters have to be shown before the justices, who are not bound to issue a warrant, and they can state a case for the opinion of the Divisional Court. [The Money Payments (Justices Procedure) Act, 1935, and the Magistrates' Courts Act, 1952, were referred to.] Rates are an ordinary debt and can be sued for in bankruptcy: *In re The North Bucks Furniture Depositories Ld.*[16]; *In re McGreavy* [17]; and, therefore, despite the special method, proceedings for recovery are ordinary proceedings in a court of law.

If the Limitation Act, 1939, does apply to proceedings for the recovery of rates, then, in the light of *Thomson* v. *Beckenham Rating Authority*,[18] in which it was held that a rate is payable as soon as it is made and published, time under the Act runs from that date. As in the present case more than six years have elapsed since the rate first became payable the appellant is not liable.

G. D. Squibb for the respondents. Proceedings in a justices' court for the recovery of rates do not fall within the definition of " action " in section 31 of the Limitation Act. It is clear from the context that all proceedings cannot be included and that the definition does not apply to the proceedings in question. Section 2 applies a limitation to actions in which a cause of action has accrued; the accrual of a cause of action presupposes two contending parties, and there is no such accrual in proceedings for the recovery of rates, which are quite different from proceedings to enforce a cause of action, and are in the nature of an execution. In *Potts* v. *Hickman* [19] it was held that such proceedings were not within the limited meaning of the Act there considered. In that case Lord Maugham said [20]: "It would seem to follow that "the justices are performing a somewhat special and a mixed "function in granting a distress warrant, and in my opinion it is straining the language of the Act of 1709 [21] to call the decision "of the justices a judgment inter partes": see also the observations of Lord Wright.[22] Proceedings before justices for a distress warrant to recover arrears of rates are far from being proceedings between a plaintiff and a defendant and are of a special nature. They are more akin to proceedings of a criminal nature: *Seaman* v. *Burley*.[23] They are not the sort of proceedings which the Act was intended to cover.

---

[11] [1941] A.C. 212; 57 T.L.R. 155; [1940] 4 All E.R. 491.

[12] (1880) 5 Q.B.D. 300.

[13] [1941] A.C. 212.

[14] Ibid. 239.

[15] 5 Q.B.D. 300, 301.

[16] [1939] Ch. 690; 155 T.L.R. 694; [1939] 2 All E.R. 549.

[17] [1950] Ch. 150; 61 T.L.R. (Pt. 1) 28; [1950] 1 All E.R. 30.

[18] [1947] K.B. 802; 63 T.L.R. 482.

[19] [1941] A.C. 212.

Aron Owen in reply. *Seaman* v. *Burley* [23] can be distinguished on the ground of procedure. A rate is a debt in the ordinary sense: *In re McGreavy*.[24] If it is a debt, due and payable as soon as it is made and published, a cause of action within the meaning of the Act arose as from that date.

Cur. adv. vult.

November 6. LORD GODDARD C.J. This is a special case stated by justices for the county of Middlesex and raises the short and interesting question whether the Limitation Act, 1939, applies to proceedings for the recovery of rates.

In April, 1940, the appellant was in arrear in respect of rates for previous years to the amount of £26 15s. 4d. and he became liable for a further half year's rates amounting to £4 8s. 9d. in respect of his occupancy of the rated hereditament between April 1 and July 5, 1940, when he ceased to be the occupier. No action was taken by the respondents at that time against the appellant who was then on war service and later because, so it was found, they did not know where the appellant was living. On February 11, 1953, having ascertained his whereabouts the respondents made a further demand for payment, from which I assume the court was satisfied that previous demands had been made as in the ordinary course of things they would have been. No point was made that demands had not been made and on March 18, 1953, the respondents preferred a complaint against the appellant with a view to obtaining a distress warrant which was granted. It therefore appears that the respondents were seeking and have obtained a warrant for arrears all accruing more than six years ago and some at least fourteen or perhaps fifteen years ago.

---

[20] [1941] A.C. 233.

[21] Landlord and Tenant Act, 1709.

[22] [1941] A.C. 212, 244.

[23] [1896] 2 Q.B. 344; 12 T.L.R. 599.

[24] [1950] Ch. 150.

The question whether there is any period of limitation for the recovery of rates is entirely destitute of authority which perhaps is not surprising. It is hardly likely that any local authority has ever before sought to take proceedings after such a length of time and it must I think be conceded that before July 1, 1940, when the present Limitation Act came into force, it could not have been argued that there was a period of limitation. The Limitation Act, 1623, set out in terms the various personal actions to which it applied; they were actions on the case (other than for slander), actions of account, trespass quare clausum fregit, debt, detinue and replevin, for all of which six years was the period named, and shorter periods for assaults and other cases of trespass to the person and slander. Proceedings for the recovery of rates have always been regarded as a class apart. It is settled that no action lies for their recovery—*Liverpool Corporation* v. *Hope* [1]—and that the only method is that laid down in the Poor Relief Act, 1601, namely, by application to justices for a distress warrant. Nonetheless arrears of rates are a debt, and one must not confuse the debt with the remedy—*Lloyd* v. *Heathcote*,[2] *Re McGreavy* [3]; the remedy of distress is only a special procedure for dealing with defaulting ratepayers. Other matters which have been decided with reference to these proceedings are that a demand is a necessary preliminary to the application for a warrant, *Davis* v. *Burrell and Lane*,[4] and though the time limit of six months within which proceedings must be taken before courts of summary jurisdiction applies to such proceedings for the recovery of civil debts as those courts can entertain, *Mackie* v. *Fox*,[5] this limitation does not apply to those for the recovery of rates, *Reg.* v. *Price*.[6]

As I have already said it would have been impossible to contend that the Limitation Act, 1623, applied to this class of proceeding and the court has now to determine for the first time whether the Act of 1939 has applied a period of limitation. Not only is there no authority on this question but there is no "communis opinio" among text writers; the editors of the last edition of Faraday on Rating [7] are of opinion that the Act does apply, while the editors of the last edition of Ryde's Law and Practice of Rating [8] express a contrary opinion, though if I may say so, the cases they cite in support of their opinion do not really assist; all they show is that rates may be recovered after the year for which they have been made. I therefore turn to the provisions of the Act of 1939.

---

[1] [1938] 1 K.B. 751; 54 T.L.R. 425; [1938] 1 All E.R. 492.

[2] (1820) 5 Moore C.P. 129.

[3] [1950] Ch. 150; 61 T.L.R. (Pt. 1) 88; [1950] 1 All E.R. 30.

[4] (1851) 10 C.B. 821.

[5] (1911) 75 J.P. 470.

[6] (1880) 5 Q.B.D. 300.

Section 2 (1) enacts that " The following actions shall not be " brought after the expiration of six years from the date on which " the cause of action accrued " and among those enumerated are actions to recover any sum recoverable by virtue of any enactment other than a penalty or forfeiture or sum by way of penalty or forfeiture. If that section stood alone it is clear that as no action lies for the recovery of rates—*Liverpool Corporation* v. *Hope* [9]—it would follow that it has no application.

It is unnecessary to burden this judgment by referring to the numerous decisions as to the meaning of " action ", as for the purposes of the Act the word is defined by section 31 (1) as any proceeding in a court of law, including an ecclesiastical court unless the context otherwise requires. It is not in my opinion open to doubt that an application for a distress warrant is a proceeding in a court of law. The dicta of Cockburn C.J. in *Sweetman* v. *Guest* [10] and *Reg.* v. *Price* [11] that justices are in such a matter acting ministerially and not judicially has not been followed. In *Potts* v. *Hickman* [12] Viscount Simon L.C. said [13] that justices when granting a distress warrant are proceeding judicially. Lord Wright said [14] that an order for a warrant of distress was made in a judicial proceeding and [15] that the dictum of Cockburn C.J.[16] could not be supported as a statement of the general law, adding [17] " Even if the party summoned has no valid " objection which he can raise to being rated because the facts " are clear, the justices still act judicially in making the particu- " lar order of distress even though no other course is open to " them judicially." The cases show that the rate itself constitutes an order to pay, though as I have already said they also lay down that proceedings to enforce payment cannot be commenced until there has been a demand and subsequent

---

[7] (5th ed., 1951, p. 330.)

[8] (9th ed., 1950, p. 817.)

[9] [1938] 1 K.B. 751.

[10] (1868) L.R. 3 Q.B. 262, 266.

[11] 5 Q.B.D. 300, 301.

[12] [1941] A.C. 212; 57 T.L.R. 155; [1940] 4 All E.R. 491.

[13] [1941] A.C. 212, 221.

[14] Ibid. 237.

[15] Ibid. 239.

[16] 5 Q.B.D. 300, 301.

[17] [1941] A.C. 212, 239.

1953

CHINA
v.
HARROW
URBAN
DISTRICT
COUNCIL.

Lord Goddard
C.J.

default. On the hearing of the application proof is required of the service of the summons, that the rate was duly made and published, that the person named was assessed at the sum mentioned, and that it has been demanded and not paid. Various defences are open to the person summoned which it is unnecessary to detail. In my opinion therefore it is clear that there is here a proceeding in a court of law. Does, therefore, the context require a different interpretation so that this particular proceeding does not come within the definition? Mr. Squibb submitted that some limitation must be placed on the wide words of the definition. He said they could not include, for instance, criminal proceedings. That is perfectly true, but criminal cases clearly do not fall within section 2 (1), which refers to proceedings for the recovery of money, nor within any other section of the Act. The penalties excluded by the section are in my opinion those for which what is known as a penal action can be brought. But the words of the definition show that it is intended to bring within the scope of the section proceedings to which the term " action " would be inapplicable.

Mr. Squibb's main argument was that the limitation imposed by the section runs from the date of the accrual of the cause of action, and he contended that as no action lies for rates there could be no cause of action. But if the word " action " is to embrace proceedings which are not actions in the true sense it seems to me that for " cause of action " must be read " cause of " proceeding," and the cause of the proceeding in this case is the failure to pay on demand. I would accordingly hold that time runs from the demand. I have already pointed out that as the case refers to the further demand in February, 1953, that implies that earlier demands were made though proceedings were not taken, and from the other facts found in the case those demands must have been made not later than July, 1940. There is no special form of demand that must be served before proceedings for recovery can be taken; the common form which is sent to every ratepayer each half year is all that is required. Limitation of actions is imposed by positive law and courts can only refuse to enforce claims on the ground of lapse of time if there is an appropriate provision to be found in the Act, but I see no good reason for unduly limiting words which can apply to a particular case as courts always lean against stale claims. The Act of 1939 is not a mere consolidating statute—its title shows it to be one consolidating and amending the law—and in my opinion the very wide terms of the definition show that section 2 (1) of the Act was intended to apply to all money claims made in a court. This view I think is to some extent strengthened by the inclusion of ecclesiastical courts in the definition section. The Limitation Act, 1623, made no reference to those courts and, while I make no pretence to be familiar with the suits that can be brought in them, I cannot find that they ever dealt with any of the actions mentioned in that Act except slander. The Real Property Limitation Act, 1833, now repealed, dealt with actions relating to the right of presentation to a benefice, and its provisions reappear in section 14 of the Act of 1939. The actions which would come within that section would normally at least be dealt with in the temporal courts, though it may be that some questions relating to rights of presentation could still be dealt with by means of the practically obsolete ecclesiastical suit of duplex querela. I hesitate to express any opinion on such matters because temporal judges are not required to be learned in ecclesiastical law. That was one of the reasons given in *Rex* v. *The Chancellor of St. Edmundsbury and Ipswich Diocese*,[18] why certiorari does not lie to those courts though prohibition may. But when I find reference both to ecclesiastical courts and to all classes of arbitration in the present Act it leads me to think that the legislature meant to bring every class of litigation, before whatever tribunal it might come, within the ambit of the statute. While appreciating the careful consideration given to the case by the justices I would allow the appeal.

SELLERS J. In this special case the question has been raised, apparently for the first time in the courts, whether the provisions of section 2 (1) (*d*) of the Limitation Act, 1939, apply to proceedings brought in a court of summary jurisdiction for the issue of a distress warrant for the recovery of rates.

Proceedings after six years to recover rates by distress must have been rare if they have previously been taken at all after so long delay but there would seem to be no trace in any of the authorities of any time limit which could have been relied on prior to the Act of 1939.

The main question which arises is whether the definition of "action" in section 31 (1) of the Act of 1939 can be applied to section 2. Section 31 (1), as far as it is material, is as follows—"In this Act, unless the context otherwise requires . . . "'Action' includes any proceeding in a court of law, including "an ecclesiastical court."

---

[18] [1947] K.B. 263, 274.

It was submitted on behalf of the respondents that the context in section 2 did require that some restriction should be put on the words "any proceeding in a court of law" because the section makes the time of limitation run from the date "on "which the cause of action accrued," and it was said this was inappropriate to the procedure by which and by which alone, rates can be recovered. But whilst in the case of rates it cannot be said there is a cause of action—*Liverpool Corporation* v. *Hope*[19]—there does arise a cause of proceeding in a court of law. If the appropriate proceedings are taken to enforce a debt for rates the hearing is a judicial proceeding and not as the respondents apparently submitted before the justices a ministerial matter: *Potts* v. *Hickman.*[20] In such a judicial proceeding matters have to be proved by the applicant and issues may be raised by a person so summoned before the court. The elements for constituting a proceeding in a court of law are present. In *Roberts* v. *Metropolitan Borough of Battersea,*[21] Buckley L.J. said[22]: "'Proceeding' would be a word with a larger meaning than "'action.' Every action is a proceeding, but it is not possible "to say that every proceeding is an action."

The definition in the Act was obviously intended to enlarge the more normal meaning of action and I do not think the context of section 2 does require that the definition of "action" should not be applied to it. If the definition is applied, then the section should be read to provide that the following proceedings in a court of law shall not be brought after the expiration of six years from the date on which the cause of proceedings in a court of law accrued, that is to say, (d) proceedings in a court of law to recover any sum recoverable by virtue of any enactment. That interpretation seems to me to be in harmony with the context, not repugnant to it.

In *Davis* v. *Burrell and Lane,*[23] Jervis C.J. said[24]: "When a "rate is duly made and published, it is the duty of the parties "assessed to seek out the collector and to pay it. . . . The statute "43 Eliz. c. 6 * requires a personal demand before the rate can "be distrained for. That shows that a demand would otherwise "be unnecessary." The cause of the proceedings, therefore, for a rate might be said to arise when the rate is duly made and published and is not paid, but a demand as a matter of procedure has always been necessary before the recovery of the rate could be enforced. In respect of a general rate, section 7 of the Rating and Valuation Act, 1925, requires that information with respect to a number of matters shall be included in the demand note on which the general rate is levied. As proceedings cannot be taken until such a demand note has been given and the demand has not been met, I think the cause of the proceedings for a rate should be held to be the failure to pay on demand and, if I am right that section 2 can be applied to the proceedings for a distress warrant, the period of six years in which the proceedings must be taken would run from the time of the demand of the rate in question. I agree that the justices came to an incorrect decision in law and I would allow the appeal.

---

[19] [1938] 1 K.B. 751.

[20] [1941] A.C. 212.

[21] (1914) 110 L.T. 566.

[22] Ibid. 568.

[23] 10 C.B. 821.

[24] Ibid. 826.

* "An act to prevent trifling and "frivolous suits in law . . . in West- "minster," apparently in error for 43 Eliz. c. 2 (Poor Relief Act, 1601).

HAVERS J. This is an appeal by way of case stated from an order of the justices of the county of Middlesex, for the issue of a distress warrant for the sum of £31 4s. 1d. Of this sum, £26 15s. 4d. was for arrears of the general rate due from the appellant in respect of years prior to April, 1940, and the balance, namely £4 8s. 9d., was the proportion of a further half year's rate during the period of occupation by the appellant of the rated hereditament from April 1, 1940, to July 5, 1940.

The case raises a novel and difficult question, whether the Limitation Act, 1939, applies to proceedings for the issue of a distress warrant for the recovery of rates. Section 2 (1) provides that certain actions which are therein specified shall not be brought after the expiration of six years from the date on which the cause of action accrued. They include in section 2 (1) (*d*) actions to recover any sum recoverable by virtue of any enactment other than a penalty or forfeiture or sum by way of penalty or forfeiture.

The appellant contended unsuccessfully before the justices that proceedings by a rating authority before the justices for the issue of a distress warrant for arrears of general rates are an action to recover a sum recoverable by virtue of an enactment within the meaning of section 2 (1) (*d*) of the Limitation Act, 1939. The respondents contended that, inasmuch as no action lies for the recovery of rates (*Liverpool Corporation* v. *Hope* [25]) there can be no cause of action or accrual of a cause of action within the meaning of section 2. They also contended that the justices were acting ministerially and not judicially in ordering the issue of a distress warrant.

---

[25] [1938] 1 K.B. 751.

In section 31 (1) of the Act of 1939, action is defined, so far as material, as follows:—" In this Act, unless the context other- " wise requires . . . ' Action ' includes any proceeding in a court " of law, including an ecclesiastical court." It is therefore necessary to examine the nature of rates and means for recovering the sums assessed.

The foundation of the liability to pay rates is to be found in the Poor Relief Act, 1601. By section 2 of that Act provision is made for the making of a poor rate and for the recovery of rates which are unpaid by the issue of a warrant for distress. The Act of 1601 does not contain a provision requiring the alleged offender to be first summoned before the justices, and for a great many years it was not the law that such a summons was necessary. However, by the end of the eighteenth century, as a result of the decisions in *Rex* v. *Benn and Church*[26] and *Harper* v. *Carr*,[27] it was settled that a summons should precede a warrant of distress, as is now laid down by statute: Distress for Rates Act, 1849. Since 1601 a number of statutes have been passed dealing with rating which I think it is not necessary to consider. It is sufficient to say that since the year 1601 down to the Rating and Valuation Act, 1925, no statute has ever provided the local authority with any remedy for the non-payment of rates other than the remedy by distress.

Section 2 of the Rating and Valuation Act, 1925 (which makes provision for the making of " the general rate ") provides that every general rate shall be made, levied and collected, and shall be recoverable, in the same manner in which at the commencement of that Act the poor rate may be made, levied, collected and recovered, and all the enactments relating to the poor rate which are in force at the commencement of that Act shall apply to the general rate. Section 4 provides that every rate made by a rating authority shall be deemed to be made on the date on which it is approved by the authority. Section 6 requires publication of the rate within the time and in the manner therein prescribed. Section 7 provides that information on certain matters shall be included in the demand note on which the general rate is levied. A general rate, therefore, is not a common law liability, but is a creature of statute, and the only remedy for enforcing it is the statutory remedy by distress.

---

[26] (1795) 6 Term Rep. 198.

[27] (1797) 7 Term Rep. 270.

The form of the distress warrant, which was set out in the Schedule to the Distress for Rates Act, 1849, indicates the various matters which have to be proved by the rating authority and found by the justices before they can issue a distress warrant. There are also various matters which it is open to the person summoned to raise by way of objection. At one time the view was held that in such proceedings the justices were acting ministerially and not judicially, *Sweetman* v. *Guest*,[28] and *Reg.* v. *Price*.[29] However, since *Potts* v. *Hickman*,[30] it cannot, in my opinion, now be successfully contended that an order for a warrant of distress is not made in a judicial proceeding or that justices are not acting judicially in making an order. In my opinion, an application for a distress warrant is a proceeding in a court of law. Is there any compelling reason why the context should require that these particular proceedings should not be included within the definition?

In my opinion, it is clear that proceedings for the recovery of rates do not fall within the category of personal actions mentioned in section 3 of the Limitation Act, 1623, or within any other Limitation Act which was in force prior to the Act of 1939. It is perhaps somewhat surprising that, if it was intended to make a change in the law for the first time since 1601 by imposing a limitation of time upon proceedings for the recovery of rates, clearer language specifically referring to rates should not have been used in section 2 of the Limitation Act of 1939. The Act of 1939 is, however, an amending as well as a consolidating Act, and as the language used in section 2 (1) (*d*) and section 31 is apt to cover an application to justices for the issue of a distress warrant for arrears of rates, I see no good reason why such proceedings should be excluded. My view is strengthened by a comparison between the definition of " action " in section 225 of the Supreme Court of Judicature (Consolidation) Act, 1925, and in section 31 of the Limitation Act of 1939. In the former, " ' Action ' means a civil proceeding commenced by " writ or in such other manner as may be prescribed by rules " of court, but does not include a criminal proceeding by the " Crown." The wide words of the definition in the Limitation Act, 1939, show that it was intended to bring within the ambit of section 2 proceedings to which the term " action " would not normally be appropriate.

---

[28] (1868) L.R. 3 Q.B. 262.

[29] (1880) 5 Q.B.D. 300.

[30] [1941] A.C. 212.

It remains to consider the meaning of "cause of action" if "action" is to be considered as including proceedings for the recovery of rates. If the word "action" is to embrace proceedings which are not actions in the ordinary sense, "cause of "action" should, in my view, be read as "cause of proceeding." The cause of the proceedings, in my opinion, accrues when a ratepayer fails to pay on demand a rate duly made and published in respect of which he has been assessed and the period of six years in which the proceedings must be taken would run from the failure to pay on demand.

In my opinion, the justices came to an incorrect decision upon the question of law, and I would allow the appeal.

Appeal allowed.

Solicitors: *Eric H. Davis & Co.; Sharpe, Pritchard & Co., for the Clerk, Harrow Urban District Council.*

J. F. L.

GOUGH *v.* NATIONAL COAL BOARD.

[1951 G. No. 681.]

C. A.

1953
Oct. 15, 16;
Nov. 4.

Singleton,
Birkett and
Hodson L.JJ.

Negligence—Children—Licence to go over land—Unguarded tramway—Child injured while stealing ride on colliery tram—Child's knowledge of wrongdoing—No necessary implication of knowledge of danger—Tramway a dangerous allurement—Liability.

The defendants operated a colliery tramway which ran over their land through a mining village with houses on both sides. It was unfenced and unguarded, and unattended journeys of slow-moving trucks passed up and down the track at frequent intervals, being worked by an engine at the top of an incline. For many years the public had been tacitly permitted to cross the track, and children played near it, and sometimes rode on the trucks, though that practice was not tolerated by the defendants, who knew of it.

The infant plaintiff, aged six-and-a-half years, rode on a truck and was severely injured while trying to jump off. He brought an action, by his father, alleging negligence against the defendants. At the hearing he admitted that he knew that he was not supposed to play on the trucks and that his father would punish him if he did so. The trial judge found that the infant was a licensee over the whole of the land. He held that the tramway was an allurement which the defendants were under a duty to protect; and that

C. A.
1953

GOUGH
v.
NATIONAL
COAL
BOARD.

the infant's knowledge that he was doing wrong made no difference because he was too young to appreciate the real danger; and he gave judgment for the plaintiffs. On appeal by the defendants:—

Held, that the infant had a general licence to go on the track, and that that licence could not be limited in such a way as either (a) to make him a trespasser ab initio because he had gone on the track to play, or (b) to reduce him from a licensee to a trespasser the moment he climbed on to the truck, for the truck was an allurement, and the defendants were under a duty to take reasonable care to protect him as a licensee against an object on their land which they knew was both attractive and dangerous to a child of his age, who was doing exactly what they should have foreseen he would do. The infant's knowledge that he was disobeying his father's warning did not postulate in him either a complete or partial knowledge of the danger of what he was doing such as to change the character of the truck from a concealed to an obvious danger and thereby to absolve the defendants from their duty to guard it, and they were accordingly liable in damages.

Hardy v. *Central London Railway Co.* [1920] 3 K.B. 459; 36 T.L.R. 843 distinguished.

Holdman v. *Hamlyn* [1943] K.B. 664; [1943] 2 All E.R. 137 applied.

Decision of Finnemore J. affirmed.

APPEAL from Finnemore J.

The defendants, the National Coal Board, were the owners and occupiers of the Albion Colliery, Cilfynydd, South Wales. Waste from the colliery was carried up to a pit by a tramway about 1,000 yards long, eight trams or trucks being drawn up by an engine at the top of the slope at a speed of about six miles an hour about 24 times a day. When the colliery was under former ownership there had been a rider on one of the trucks as they went up and down, but, as that was considered a dangerous practice, it was discontinued. Later a maintenance man had worked on the lines when the journeys were made; but the National Coal Board had not continued that practice, and no one accompanied the trucks, nor was anyone on duty on the track when the journeys were made.

In Cilfynydd, a mining village, there were houses on both sides of the lower part of the track, which was not fenced in any way, and there was only one warning sign at the bottom of the incline. For many years men, women and children had been allowed on the land, and they crossed the track to go to the graveyard, the public-house, allotments, the swimming baths, or simply for a walk, there being at least three paths used by the public. Children often played near and on the tramway, and on occasions actually rode on the trucks when they were on a journey, though that was not tolerated by the defendants and they were often chased away.

On December 2, 1950, the infant plaintiff, Gerwyn Evan Gough, then aged six-and-a-half, who lived with his parents some 80 to 100 yards from the track, went up the incline on to the track with another boy, and they jumped on to a moving journey of trucks. Later the plaintiff tried to jump off, but slipped and fell; his right leg was caught under a wheel and had to be amputated above the knee, leaving a short stump.

Through his father as next friend, the infant plaintiff brought an action against the defendants, alleging that his injuries were caused by their negligence, and that the journey of trucks constituted an allurement and/or trap. The defendants denied negligence. They did not plead contributory negligence, in view of the infant's age, but they pleaded that the danger of the journey of trucks was obvious and that the plaintiff knew or ought to have known of it.

At the hearing, witnesses pointed out the danger of the moving trucks. They said that they had seen children playing about and jumping on the journeys, and had told them to go away; the manager of the colliery said that whenever it had been reported to him that children had been seen riding on the buffers, he had given instructions to the defendants' servants to "get after those "boys if they are riding."

The infant plaintiff gave evidence, and said that the occasion of the accident was not the first time that he had jumped on to a truck, but that he was following a practice pursued by other boys and that he had never been stopped by anyone. Under cross-examination, he admitted that he knew that it was wrong to ride on the trucks, that he had been told by his parents not to do so, and that his father would have punished him if he had known that he was riding on them.

Finnemore J., on March 31, 1953, found that the infant was a licensee over the whole of the land when he was injured, and that the defendants knew that the slowly-moving trucks were an allurement to children and should have protected them against the concealed danger; he held that the fact that the infant knew that he should not have ridden on the trucks made no difference, because he was not of a sufficient age to appreciate the real danger of what he was doing. He gave judgment for the plaintiff for £4,000.

The defendants appealed.

C. A.
1953

GOUGH
v.
NATIONAL
COAL
BOARD.

H. V. Lloyd-Jones Q.C. and *Norman Francis* for the National Coal Board. Finnemore J. held that the journey of trucks was an allurement, a concealed danger, and that it was the defendants' duty to see that children, who were allowed on their land, did not come into contact with the trucks. It is submitted, first, that since the injured child admitted that he knew that he would be punished by his father if he jumped on the trucks, he must also have known that it was dangerous, or at least have appreciated, at the age of six-and-a-half, that there was some danger. In that event, the journey of trucks was not a trap, but an obvious danger which the defendants were under no duty to guard, and he cannot recover against them. A trap involves the idea of concealment: *per* Hamilton L.J. in *Latham* v. *R. Johnson & Nephew Ld.*[1]; see also *per* Scrutton and Slesser L.JJ. in *Liddle* v. *Yorkshire* (*North Riding*) *County Council*,[2] where falling off a wall on to a heap of stones was treated as an obvious danger to a boy of seven.

[HODSON L.J. But the boy there was a trespasser. In the present case the child may have appreciated, not the danger of the actual machine, but only the danger of being beaten by his father.]

Secondly, assuming that there was tacit permission for the child to go on the land for the particular purpose of crossing the track, he became a trespasser as soon as he climbed on to the truck.

[HODSON L.J. Once he is a licensee on the land, is there authority for the proposition that objects on the land can be isolated so as to limit the licence and make him a trespasser on the object?]

Jenkins v. *Great Western Railway Co.*[3] is authority for saying that a licence may be limited so that there is a right to be at point A and no right to be at point B: see *per* Cozens-Hardy M.R.[4] and Fletcher Moulton L.J.[5]—though no question of allurement arose in that case. In *Cooke* v. *Midland Great Western Railway of Ireland*,[6] which is generally regarded as the high-water mark on liability to children, the children were licensees not only on the land but also on the turntable on which the child—a passive victim—was injured. In the present case not only was complaint made every time children jumped on to the trucks, but this child did it deliberately, and so became a trespasser. *Hardy* v. *Central London Railway Co.*[7] is particularly relied on, for there children were often chased away from the booking-hall; they were trespassers at the place where the accident happened, as was this boy at the place where he was hurt: see *per* Bankes L.J.[8] that children were always warned off. *Edwards* v. *Railway Executive*[9] is also relevant, and in particular the speech of Lord Goddard C.J.[10] where he said that it was absurd to suppose that a railway authority consciously gave permission to small boys to wander or play on their embankments or lines which were in active use by electric trains. In addition there was here the express prohibition by the defendants and by the boy's parents.

---

[1] [1913] 1 K.B. 398, 415–6; 29 T.L.R. 124.

[2] [1934] 2 K.B. 101, 113, 128; 50 T.L.R. 377.

[3] [1912] 1 K.B. 525.

[4] Ibid. 532.

[5] Ibid. 534.

[6] [1909] A.C. 229; 25 T.L.R. 375.

Lastly, the boy here went to the place, not to exercise the limited licence to cross, but to do what he had been told not to do; he went with the intention of playing. That lends support for the submission that he was a trespasser ab initio, and in that event there was no duty on the defendants at all except not to do him a wilful or reckless harm.

[SINGLETON L.J. In *Edwards'* case[11] the Railway Executive had done all that they could to keep children out; but here it is admitted that this child had a licence to cross the line itself, and the defendants, though they sometimes chased children away, put up no fence and had no regular warning. If one licenses a young child, not old enough to be guilty of contributory negligence, to come on to one's premises, does not one owe a duty of reasonable care to him if he does the very thing which one would expect a child of his age to do?]

H. Edmund Davies Q.C. and *Alun T. Davies* for the plaintiffs. The decision of Finnemore J. was in accordance with well-established principles: see *per* du Parcq L.J. in *Holdman* v. *Hamlyn*,[12] where the injured infant was an invitee who went outside the area to which his invitation extended, but it was held that there was a duty on the occupier. A fortiori here, where the infant plaintiff was still within the limits of the land in regard to which he clearly had the licence.

It is submitted that (1) the plaintiff was a licensee in respect of the land over which the track ran; (2) the defendants' duty accordingly was not to have on the land a concealed danger or trap; (3) having regard to the age of this plaintiff, the journey of trucks constituted a trap; (4) the plaintiff's action in climbing on the truck was clearly foreseeable by the defendants in that it was what could be expected; (5) the plaintiff, having been injured in that way, the defendants are responsible in law.

---

[7] [1920] 3 K.B. 459; 36 T.L.R. 843.

[8] [1920] 3 K.B. 459, 466.

[9] [1952] A.C. 737; [1952] 2 T.L.R. 237; [1952] 2 All E.R. 430.

[10] [1952] A.C. 737, 746–8.

[11] [1952] A.C. 737.

[12] [1943] K.B. 664, 668; [1943] 2 All E.R. 137.

In *Lynch* v. *Nurdin* [13] the owner of a vehicle left on a busy highway was held liable even though children had no right to go on to that which was an allurement for them: see also *Donovan* v. *Union Cartage Co. Ld.*,[14] where the plaintiff failed only because it was held that a cart with no horse was not an allurement. In many cases, contrary to the defendants' submission here, a plaintiff has succeeded although the object which caused the injury has been one which was not within the licence or invitation at all. It cannot be said here that the child ceased to be a licensee and became a trespasser when he got on to the truck; he was doing just what he might be expected to do. Nor is it conceded that because he had been warned not to get on to the journey of trucks he must in some degree have been conscious of the risk to himself and so cannot succeed. On "moral traps," and the duty not to lead others into temptation, particularly where the "others" are very young people, see *per* Hamilton L.J. in *Latham* v. *R. Johnson & Nephew Ld.*[15]

Finnemore J. found in the plaintiff's favour that he did not appreciate the real danger. The fact that his father had told him not to get on to the trucks did not mean that the danger was brought home to him. A child's world is full of the prohibitions of grown-ups. If a child thought that all the "don'ts" of a day meant that a danger was contemplated it would be different; but there is no evidence that the danger of personal injury was present in the boy's mind in doing what children had been doing for many years—and there had never before been an accident. The case was decided in the only way in which it could be decided. [*Glasgow Corporation* v. *Taylor* [16] and *Davies* v. *Swan Motor Co. (Swansea) Ld.*[17] were also referred to.]

Francis in reply. If this child had been crossing the line and had jumped on a truck on an impulse the position in law might be different; but he went up to play, and therefore the case is covered by what was said in *Hardy* v. *Central London Railway Co.*[18]; that which made the children in that case into trespassers was not that they went into the booking-hall, but that they went there to play—they were doing what was forbidden.[18] So, here, the children were not permitted to go on to the track or on to the trucks for the purpose of playing on them; and there is the evidence that playing was not tolerated. [*French* v. *Hills Plymouth Co.*[19] was also referred to.]

---

[13] (1841) 1 Q.B. 29.

[14] [1933] 2 K.B. 71; 49 T.L.R. 125.

[15] [1913] 1 K.B. 398, 415.

[16] [1922] 1 A.C. 44; 38 T.L.R. 102.

[17] [1949] 2 K.B. 291; 65 T.L.R. 278; [1949] 1 All E.R. 620.

[18] [1920] 3 K.B. 459, 470.

Cur. adv. vult.

November 4. SINGLETON L.J. stated the facts, considered the evidence, in particular that of witnesses who referred to the presence under former ownership of a maintenance man on the track, and continued: I have referred to this evidence to show the value of having someone on or near the track when the trucks are in motion. There is no doubt about the danger to children; it was well known that they used the track, and that they sometimes jumped on the slowly-moving trucks. An assistant at the washeries, who was called on behalf of the defendants, said that the practice of jumping on to the journeys had gone on for 18 to 20 years. He had been employed at the colliery for 43 years, and had at one time been traffic foreman. The manager said that he had had reports of boys jumping on the journeys, though he had not seen it himself.

Finnemore J., in the course of his judgment, said: "There "were no warning signs except one right at the bottom near the "village, and I think that it is common ground now that people "frequently crossed this line, and children frequently crossed this "line. It was a short cut to the swimming baths; it was a way "of going to certain allotments, and in addition, children played "either near the line on colliery property, or actually over the "line itself. In addition to these matters, it appears to be true "that, at all events not so infrequently as to be a rarity, boys "used to yield to the temptation of getting a ride on this tramway "by standing on the buffers of one or other of the trams; often, "indeed, on the buffers of two trams, one foot on each. "It was while taking a ride of this kind that the plaintiff unfor-"tunately fell when he was getting off, so that his right leg came "under the wheel of one of the trams, with the disastrous con-"sequences which are now fully known."

The judge then referred to the evidence of a number of witnesses as to use of the track, and added: "Mr. Williams, who "struck me as being a perfectly frank and honest witness, the

---

[19] (1908) 24 T.L.R. 644.

"present manager, who has been there since 1949, actually put "the matter beyond any dispute, because he said that it was "quite a common practice to walk across the line; he knew "adults frequently crossed the line and he took no objection to "that, nor did he take any objection to children crossing the line "if that was all that they did. I do not think that it is suggested "in this case—anyhow, I am not satisfied—that the children were "allowed to ride on the buffers of the trams without complaint. "But what this all comes to for them is this, that this boy quite "plainly on the evidence—it was not really disputed by Mr. "Lloyd-Jones at the end—was a licensee so far as going on to the "colliery property and over the lines was concerned. No effort "was ever made to prevent that. There was no fencing; there "was no warning; and, as I have already pointed out, Mr. "Williams said that on the whole he did not object to it. It is "quite obvious that no one had really objected to it for many "years past."

Mr. Lloyd-Jones, for the National Coal Board, submitted that even if the plaintiff was a licensee when he was on the track, and for the purpose of crossing the track, he became a trespasser immediately he stepped on a truck, and that, in those circumstances, the defendants were not responsible in damages. He submitted that the defendants owed no duty to the plaintiff.

The difficulty of cases of this kind is well recognized. In *Latham* v. *R. Johnson & Nephew Ld.*,[1] Lord Sumner, then Hamilton L.J., said [2]: "Children's cases are always troublesome. "English law has been very ready to find remedies for their "injuries. Scottish law has been less indulgent." Then the Lord Justice referred to certain authorities, and added: "They are the "commonest cases of the general rule, which is as old as *Scott* "v. *Shepherd*,[3] that a person who, in neglect of ordinary care, "places or leaves his property in a condition which may be "dangerous to another may be answerable for the resulting injury, "even though but for the intervening act of a third person or of "the plaintiff himself (*Bird* v. *Holbrook* [4]; *Lynch* v. *Nurdin* [5]) "that injury would not have occurred. Children acting in the wantonness of infancy and adults acting on the impulse of personal "peril may be and often are only links in a chain of causation "extending from such initial negligence to the subsequent injury. "No doubt each intervener is a causa sine qua non, but unless

---

[1] [1913] 1 K.B. 398.

[2] Ibid. 413.

[3] (1773) 3 Wils. 403.

[4] (1828) 4 Bing. 628.

[5] (1841) 1 Q.B. 29.

" the intervention is a fresh, independent cause, the person guilty " of the original negligence will still be the effective cause, if he " ought reasonably to have anticipated such interventions and to " have foreseen that if they occurred the result would be that his " negligence would lead to mischief."

The Lord Justice went on to say [6]: " Two other terms must " be alluded to—a ' trap ' and ' attraction ' or ' allurement.' A " trap is a figure of speech, not a formula. It involves the idea " of concealment and surprise, of an appearance of safety under " circumstances cloaking a reality of danger. Owners and " occupiers alike expose licensees and visitors to traps on their " premises at their peril, but a trap is a relative term. In the " case of an infant, there are moral as well as physical traps. " There may accordingly be a duty towards infants not merely " not to dig pitfalls for them, but not to lead them into temptation. ' Allurements,' too, is a vague word. It may refer only " to the circumstances under which the injured child has entered " the close. Here it is hard to see how infantile temptations can " give rights, however much they may excuse peccadilloes. A " child will be a trespasser still, if he goes on private ground " without leave or right, however natural it may have been for " him to do so. On the other hand, the allurement may arise " after he has entered with leave or as of right. Then the presence " in a frequented place of some object of attraction, tempting him " to meddle where he ought to abstain, may well constitute a " trap, and in the case of a child too young to be capable of " contributory negligence it may impose full liability on the owner " or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril " of the object. Finally, what objects which attract infants to " their hurt are traps even to them? Not all objects with which " children hurt themselves simpliciter. A child can get into " mischief and hurt itself with anything if it is young enough. In " some cases the answer may rest with the jury, but it must be " matter of law to say whether a given object can be a trap in " the double sense of being fascinating and fatal. No strict " answer has been, or perhaps ever will be, given to the question, " but I am convinced that a heap of paving stones in broad " daylight in a private close cannot so combine the properties of " temptation and retribution as to be properly called a trap."

---

[6] [1913] 1 K.B. 398, 415–6.

The last passage which I read, or part of the last passage, was repeated by Lord Shaw in *Glasgow Corporation* v. *Taylor*,[7] and Lord Sumner himself in *Glasgow Corporation* v. *Taylor*, at the end of his speech said[8]: "Where a question as to the care to "be used arises between persons using as of right the place, where "they respectively act, infancy as such is no more a status con-"ferring right, or a root of title imposing obligations on others to "respect it, than infirmity or imbecility; but a measure of care "appropriate to the inability or disability of those who are "immature or feeble in mind or body is due from others, who "know of or ought to anticipate the presence of such persons "within the scope and hazard of their own operations."

Now, this child was on the track with the tacit permission of the defendants. At the time of the accident he was doing something which he might have been expected to do and which, from the history, the defendants might have anticipated that he, or any other boy, would probably do. The slowly-moving trucks were an attraction to boys. Boys knew that they ought not to get on them, but can it be said that this boy appreciated the risk which he was running? He was not asked a question on that.

In *Liddle* v. *North Riding of Yorkshire County Council*,[9] Scrutton L.J. said[10]: "In my opinion, to make the landowner "liable for injury to a child on his land, it must be proved that "he expressly or impliedly invited children on to his land, and "either did an act which caused damage with knowledge that it "might injure the children, or knowingly permitted the existence "on his land of a hidden danger or trap. The invitation might "be implied from knowledge that children frequented the land "without interference. For obvious dangers, such as unguarded "water, natural or artificial, he will not be liable."

I do not think that any help is given by the decision in *Hardy* v. *Central London Railway Co.*,[11] for in that case it was held that the boy was fully aware that he was a trespasser in the booking-hall.

Mr. Lloyd-Jones's submission that the plaintiff became a trespasser when he got on to the truck appears to me to be answered by a passage from the judgment of du Parcq L.J in *Holdman* v. *Hamlyn*,[12] where the Lord Justice said[13]: "It was, "indeed, argued that the infant plaintiff was a trespasser. The

---

[7] [1922] 1 A.C. 44, 63.
[8] Ibid. 67.
[9] [1934] 2 K.B. 101.
[10] Ibid. 112.
[11] [1920] 3 K.B. 459.
[12] [1943] K.B. 664.
[13] Ibid. 668.

"truth is, however, that he was an invitee, at any rate down to "the moment when the threshing machine proved an irresistible "temptation. If the boy strayed beyond the strict limit imposed "by the terms of the invitation, it was because of the failure of "the defendant's agent to guard him against a dangerous allurement, and, if he can properly be called a trespasser at all, the "trespass was a natural and probable result of the negligence "of the defendant's agent. A defendant who has lured an "invitee into a forbidden area cannot thereafter treat him as a "trespasser."

An examination of the authorities leads me to the conclusion that if an occupier allows children of tender years on his land, and if he has thereon something which is, to his knowledge, attractive to them and which is dangerous, he must take reasonable care to protect them from the danger. Warning may be sufficient in some cases, though not in all. What is reasonable care depends on a number of circumstances, among which are: (1) the nature of the land and the position and nature of the dangerous object; (2) the knowledge of the occupier; and (3) the age of the children. Of these the last, perhaps, presents the most difficulty. A child may know that he ought not to do something. It does not follow that he appreciates the danger or likely consequence of his doing that which he ought not to do. The plaintiff was considered to be too young to be guilty of contributory negligence, and I do not think that it ought to be held that he appreciated the danger of that which he did in the absence of any question directed to that point. The defendants might have forbidden the use of the track to persons generally or to children. They might have fenced the track, or they might have had someone on or about the lower part of the track, where there are houses, when the tramway was in motion. They did none of these things. There is evidence that on some occasions children were chased away. Whether that was sufficient in the circumstances is a question of fact.

The position is summarized in Winfield's Law of Tort (5th ed., p. 587) in this way: "An occupier must take reasonable care to "see that children, of whose presence he knows or ought to know "or to anticipate and who are too young to appreciate the danger "of some attractive object under his control and within his "knowledge, are protected against injury from that danger either "by warning which is intelligible to them or by some other "means." I agree with that statement of the law.

Finnemore J. said that he could think of "few things more "likely to tempt small boys than a slow-moving set of trams on "which a boy can get for a little distance a pleasant and unusual "ride. From time immemorial boys have always been anxious "to get rides, and it has always been a very real allurement to "them."

His judgment shows that he did not consider that the defendants had taken the steps which they ought to have taken; and, further, that the plaintiff did not appreciate the real danger of what he was doing. Those were questions of fact for the judge, and this court ought not to interfere with his findings on them. Moreover, they were amply warranted on the evidence, and I agree with them. I am in favour of dismissing the appeal.

Birkett L.J. stated the facts, and continued: It became clear, as the case progressed, that the infant plaintiff at the time of the accident was in the position of a licensee on the defendant's land, and a licensee to cross and recross the tramway. Mr. Lloyd-Jones for the defendants said, however, that there was one important feature of the case which distinguished it, on the facts, from the reported cases on the subject of the position of children and the duties of occupiers of land, and that was that the boy had been warned by his father not to ride on the trams, and had been told many times of the danger of so doing. But the father also said that he did not know whether his son was old enough to appreciate the danger of which he had been warned. The infant plaintiff told Mr. Lloyd-Jones that he knew that it was wrong to ride on the trams, because his father had told him not to do it, and that his father would have hit him had he known of his disobedience.

Mr. Lloyd-Jones therefore submitted that even if the infant plaintiff was a licensee on the land in the limited sense for which he contended, he was not a licensee to ride on the trams, and that the moment that he climbed on to the trams to take the forbidden ride he was in fact and in law a trespasser and was there at his own peril, and that the defendants were not liable to him for the injuries which he had sustained. The issue raised by Mr. Lloyd-Jones is to be decided, I think, on the facts of the particular case. The evidence may show that an occupier of land is well aware that young children habitually come on to his land for one purpose or another, and tacitly allows them so to come, and takes no step whatever to forbid them or to remove them; he may know, or should know, that on his land there is some particular object which in the ordinary course of things will be a great attraction to children; he may know, or should know, that some of the children who come on to his land are much too young to appreciate that the attractive object may have dangers for young children; and if these things are proved in evidence, his duty is to take suitable precautions to prevent injury to the children in those circumstances, and to protect them against the danger which they were too young to appreciate. But everything turns on the particular facts of each case.

In *Cooke* v. *Midland Great Western Railway of Ireland*,[14] the facts showed that the child was not a trespasser, but at least a licensee, and in that case not merely a licensee as to the land on which the turntable stood, but also as to the turntable itself, and that the turntable was properly described as a trap.

But in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*,[15] a child of four was killed by being crushed in the terminal wheel of a haulage system belonging to a colliery company. That wheel was attractive and dangerous to children, and was in a field belonging to the defendants which was inadequately fenced, which field the defendants knew was used by children as a playground. The child had been warned by his father not to go near the field or the wheel. The child was held to be a trespasser and the defendants were not liable. But the ground of that decision emphasizes what I think is the quite vital distinction between that case and the present one, for, in the words of Lord Dunedin[16]: " . . . when a proprietor protests and goes on protest-" ing, turning away people when he meets them, as he did here, " *and giving no countenance in anything that he does to their* " *presence there*, then I think no court has a right to say that " permission must be implied."

In the present case Finnemore J. said: " But what all this " comes to is this: that this boy quite plainly on the evidence— " it was not really disputed by Mr. Lloyd-Jones at the end—was " a licensee as far as going to the colliery property and over the " lines was concerned. No effort was ever made to prevent that. " There was no fencing, no warning, and as I have already said, " Mr. Williams said that on the whole he did not object to it. " It is quite obvious that no one had really objected to it for many " years past."

Similarly, in *Hardy* v. *Central London Railway Co.*,[17] the

---

[14] [1909] A.C. 229.

[15] [1929] A.C. 358; 45 T.L.R. 267.

[16] [1929] A.C. 358, 372.

[17] [1920] 3 K.B. 459.

Court of Appeal reversed the decision of the trial judge, who had based his decision on the ground that the boy in question was a licensee, by holding that the boy who was injured on the moving staircase at Liverpool Street Station, which staircase could be reached from the booking-hall which was open to the street, was a trespasser. Both Bankes L.J. and Warrington L.J. came to the conclusion on the facts proved in the case that the boy was not only a trespasser on the moving staircase, but that he was a trespasser in the booking-hall itself.

If the infant plaintiff in the present case was a licensee on the land of the defendants where this tramway ran, as Finnemore J. found, and as the evidence plainly indicates, and if this tramway with its slowly-moving trucks was an attractive thing to children, as he also found, and as the evidence plainly indicates, then I do not think that the plaintiff's claim can be disposed of by saying that the moment the boy went on to the trucks he was a trespasser. The duty of the defendants in the circumstances disclosed by the evidence has been made plain by many authorities. Mr. Edmund Davies stated it in his second submission before us in these words: "The defendants' duty accordingly was not to have on the land a concealed danger or trap." He further submitted that whether a trap exists or not depends on the facts of the particular case, and that these slowly-moving trams were in fact a trap for this boy on the facts of this case.

I do not think that it is possible to dispute these four conclusions which arise from the evidence: (a) the plaintiff was plainly a licensee on the defendants' land which contained the tramway and the trucks; (b) the slowly-moving trams were an obvious allurement to young boys, and the plaintiff was at least a licensee to cross and recross the tramways; (c) from the evidence, the defendants knew that it was such an allurement, because they knew that boys were in the habit of climbing on to the trucks and stealing rides; (d) when the trams were in motion the allurement was dangerous to young boys.

Now, although the boy had been forbidden by his father to ride on the trams, and had been warned of the danger and was conscious of his disobedience, the judge found that he did not appreciate the danger of what he was doing; and if that finding can be supported, then the slowly-moving trams became a concealed danger to the boy, and therefore properly described as a trap. Mr. Lloyd-Jones submitted that since the boy knew that he was being disobedient to his father's warning of danger, it followed that the boy must have had knowledge of some danger.

I do not think myself that it follows by any means. He may have known that he was being disobedient to his father's warning without appreciating the danger involved in disobedience. That, I think, is the view of Finnemore J. in his use of the word " real ": " The boy . . . was not, in my opinion, of a sufficient age to " appreciate the *real* danger of what he was doing. . . ."

In the judgment of Finnemore J. there are three important passages which seem to me to contain the essence of the whole matter, and with those passages I most respectfully agree.

The first is this: " From time immemorial boys have always " been anxious to get rides . . . and it has always been a very real " allurement to them. Now that means that if this moving tram- " way was an allurement to boys, and particularly to this little " boy of six-and-a-half, a danger which he would not properly " appreciate, and which would tempt him to use it in a way that " was likely to be dangerous to him, it was the duty of the defen- " dants to do something about it. One thing they might have " done—I dare say that they will do it in future—would be to " stop anybody, whether children or adults, going over this line " at all, whether by fencing it or by putting up notices, or having " someone on duty from time to time to stop it, or in some other " way; I do not know. But they must do something to see that " the children whom they allow to go near to, and on to, their " tramway line, are protected against this dangerous allurement " of a slow-moving tramway of trucks."

The second passage is this, on the duty of the occupier of land: " What he must not do to a licensee is to put a trap on his land, " and a trap, for the purpose of a child, means something which " is dangerous but very tempting and attractive, which is likely " to lead him into danger while on the land which he has entered, " at all events, with the tacit permission, if not the express per- " mission, of the owner; and I think that if the child was, as I " find he was in this case, a licensee over the whole of that land " through which the tram track ran, he did not cease to be a " licensee when he succumbed to the very temptation against " which he ought to have been protected; that is, the moving of " the tramway."

The final passage is: " Having considered all these matters, " I am of the opinion that the law as argued by Mr. Edmund " Davies is the right law, that if a child is a licensee on the land " the allurement which is on the land must be protected in some " way, and the boy does not become, for the purposes of this " doctrine, a trespasser as soon as he meddles with the very

C. A.

1953

GOUGH v. NATIONAL COAL BOARD.

Birkett L.J.

"machine against which he ought in fact to be protected. Nor "do I think that it makes any difference that the boy had been "told by his father that he should not ride on those trucks, and "that he would get into trouble at home if he was found doing it. "Forbidden fruit is not less tempting than when permissible; in "fact it is often more tempting; and a boy of six-and-a-half, "although he knew that he had been told by his father not to ride "on the trucks, was not, in my opinion, of a sufficient age to "appreciate the real danger of what he was doing, and I think "that he was extremely likely to succumb to the temptation "which, so to speak, was flaunted in front of him by this slow-"moving tramway over the property which he was in fact allowed "to use, together with other children and other people, by the "defendants."

I think that those three passages from the judgment of Finnemore J. contain the essence of this matter so far as this particular case is concerned, and that the judge stated the law correctly. The questions of fact were carefully considered by him after seeing the witnesses, and, in particular, the infant plaintiff himself, and he has stated his findings clearly. I see no ground on which his judgment can be effectively assailed, and I am of the opinion that this appeal should be dismissed.

HODSON L.J. stated the facts, and continued: The judge found that the child was a licensee on the land when he was injured, and that the journey of trams on which the child rode was a concealed danger or trap for children of the age of the plaintiff, since it was an allurement to them, the dangers of which they could not properly appreciate. He accordingly awarded damages.

The case for the defendants is put in various ways. First, it is said that the child was a trespasser from the moment he set foot on the land. Secondly, it is contended that even if he was a licensee on the land, including the lines on which the trams ran, he became a trespasser as soon as he climbed on to the journey of trams. In the third place, it is said that even if he were a licensee, yet, on the facts of this case, there was no trap or concealed danger, and he cannot recover.

The first argument is directed against the judge's finding that the plaintiff was a licensee on the land. It is said that the evidence shows only that there was a licence to cross the lines for the purpose of going to the allotments, the swimming baths, or possibly for certain other specific purposes. The licence, it is argued, must be limited in extent and cannot be construed as covering playing on the lines, still less climbing on to a moving journey of trams—a practice which was never tolerated by the National Coal Board or its predecessors, the colliery companies which had formerly occupied the land. It is said that the intention with which the child went on to the lines must be considered, and that the judge ought to have found on the evidence that, having gone on to the line to play, he was a trespasser ab initio and never became a licensee.

In support of that proposition reliance was placed on the decision of this court in *Hardy* v. *Central London Railway Co.*[17] There a small boy was injured on a moving staircase at Liverpool Street Station which led from the booking-hall to the underground platforms. The trial judge there held that he was unable to distinguish the case from the well-known case of *Cooke* v. *Midland Great Western Railway of Ireland*,[18] and that the child was a licensee. The defendants knew that children were in the habit of frequenting the station, and the judge came to the conclusion that they were there with the licence of the defendants because they did not take steps to exclude children from their property; that the moving staircase was an allurement to children; and that the defendants were negligent in not protecting the machinery at the place where the accident happened.

This court reversed the trial judge's finding of a licence and held that the child was a trespasser. In that case the evidence clearly showed that the children were warned off whenever they were seen playing on the moving staircase. Bankes L.J. came to the conclusion that they were all fully aware of the fact that they had no right to be, and no licence to be, where they were. He added that an elder boy, in whose charge the plaintiff was, appeared to have been fully aware that he was a trespasser in the booking-hall from which the escalator led, and the plaintiff was probably old enough to be aware of the fact also, since a policeman had driven the children away on several occasions.[19]

Warrington L.J., in his judgment, used these words[20]: "I "think the plaintiff was not a licensee or invitee, but a mere "trespasser. I think on the evidence that the defendants cannot "be said to have permitted children to resort to the booking-office "as a playground or for any purpose not connected with the use "of their railway."

---

[17] [1920] 3 K.B. 459.

[18] [1909] A.C. 229.

[19] [1920] 3 K.B. 459, 463–7.

[20] Ibid. 470.

That case, it is said, shows that the children were found to be trespassers only because they resorted to the station as a playground and not as intending travellers. Therefore it is said, applying the ratio of *Hardy's* case[21] to the case now to be decided, the child who was injured by falling off the tram came on to the land to play and not for the licensed purpose of crossing the line to get to one or other of the destinations mentioned. Hence he was a trespasser ab initio and cannot recover damages.

This argument will not, I think, prevail in the state in which the evidence in this case stands. The licence to go on the land was a general one, as found by the judge, and not limited to crossing the line for specific purposes, and I think that the evidence justifies his finding. He referred specifically to the evidence of Mr. Paget, who said that he had crossed the lines for years to reach the allotments, that any number of adults used the line, and that he frequently saw children playing on the line and had never seen anyone send them away. There was other evidence tending to the same effect. I think, therefore, that the judge's finding that the child who was injured was a licensee on the land should be upheld, and that this case is legitimately distinguishable on its facts from *Hardy's* case,[21] where the children were aware at all material times that they were trespassers on the land in question.

This brings me to the second point, which was that the children, being licensees on the land, were never licensees on the journey of trams, for the evidence shows that they were never allowed to ride on the trams without complaint. Hence they were trespassers on the trams if not on the land. I find this contention unsupported by authority and inconsistent with relevant authority.

Some negative support for the proposition is said to be found in the leading case of *Cooke* v. *Midland Great Western Railway of Ireland*,[22] because from that case it appears that the child who was injured was treated as a licensee not only on the land of the railway company on which the turntable which brought about his injury stood, but also on the turntable itself. Ergo, it is said, if the child had not been a licensee on the turntable, he could not have recovered damages.

I agree with the judge, who dealt with this argument by saying that such a contention destroys the whole doctrine of allurement to children. Once the child is a licensee on the land, the question of trespassing on an object on the land does not, in my opinion, arise. The trap or concealed danger will often be an object on the land, but I cannot conceive that the licence to go on the land is to be taken to exclude the thing which, being an allurement to children, is a concealed danger for them. The contention of the defendants to this effect runs counter to the decision in such cases as *Lynch* v. *Nurdin*,[23] from which all the cases on allurement to children descend. It will be remembered that in that case the injured child was unlawfully on a vehicle on a public highway. That fact was no defence to the person who had left it there, as the vehicle in question was itself an attraction to children and dangerous.

---

[21] [1920] 3 K.B. 459.

[22] [1909] A.C. 229.

Lord Atkinson, in *Cooke* v. *Midland and Great Western Railway of Ireland*,[24] dealing with the principle involved in the cases from *Lynch* v. *Nurdin*,[25] downwards, pointed out that owners of such vehicles would be liable in damages for injuries sustained by juvenile intermeddlers even though the injured person in any particular case were a trespasser on the vehicle or machine at the moment the accident occurred.

The last point made by the defendants, namely, that here there was no trap or concealed danger, because the child had been specifically warned of the danger and knew that he would be punished by his parents if he rode on the trams was, I think, effectively answered by the judge, who said that although the child had been told by his father not to ride on the trams, he was not, in his opinion, of a sufficient age to appreciate the real danger of what he was doing. In another passage in his judgment the judge referred to "a danger which he could not properly "appreciate." Mr. Lloyd-Jones contended that the child knowing it wrong to act as he did, and that he would be punished, was sufficient. I do not agree. Once the child is lawfully on the land and the allurement is there, it is the knowledge of the danger, not of the error of his conduct, which is material.

To this Mr. Lloyd-Jones replied that if that were so the judge, by using the adjective "real" before the word "danger" in one place, and the adverb "properly" before the words "appreciate "the danger" in another, must be taken to have found that some appreciation of the danger was present in the boy's mind. I cannot accept this argument. The essence of the allurement cases where young children are concerned is that they do not appreciate the risks which they run, and it is impracticable in a

---

[23] 1 Q.B. 29.

[24] [1909] A.C. 229, 237.

[25] 1 Q.B. 29.

C. A.
1953

GOUGH v. NATIONAL COAL BOARD.

Hodson L.J.

particular case to analyse minutely the degree of appreciation of the danger.

In my opinion the finding of the judge on this point does not relieve the defendants of liability, and is consistent with the evidence of the child's father, who admitted giving the warning of the danger to his child. When asked if the boy knew that it was dangerous and wrong, he replied: "I could not answer for "that. Being his age, I could not say whether he was of the age "to understand."

In my opinion, therefore, the judge was entitled to come to the conclusion that this slow-moving journey of trams travelling across the land was not only an allurement to children, but was also a concealed danger or trap in the circumstances disclosed by the evidence in this case. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *D. H. Haslam for W. H. F. Barklam, Cardiff; Theodore Goddard & Co. for Morgan, Bruce & Nicholas, Pontypridd.*

M. M. H.

C. A.

1953
Oct. 30;
Nov. 2, 3, 4.

Evershed M.R., Jenkins and Morris L.JJ.

SMITH AND OTHERS *v.* CARDIFF CORPORATION.

[1953 S. No. 3323.]

Practice and Procedure—Parties—Representative action—Action on behalf of all tenants of local authority—Conflicting interests of different classes of tenant—Whether action properly constituted—R.S.C., Ord. 16, *r.* 9.

By R.S.C., Ord. 16, r. 9: "Where there are numerous persons "having the same interest in one cause or matter, one or more "of such persons may sue . . . on behalf of or for the benefit of "all persons so interested."

The defendants, a local authority, decided that, in order to fulfil their financial obligations under the Housing Act, 1936, the rents payable by their tenants of houses provided under that Act must be increased. The scheme which they decided to apply was not to increase rents uniformly but upon a differential basis according to the incomes of the tenants; the lower paid ones were to suffer no increase at all under the scheme. The four plaintiffs, tenants of the defendants, were expressed in brackets in the writ to be suing "on "behalf of themselves and all other tenants of houses provided by "the defendants under Part V of the Housing Act, 1936." By the action they claimed a declaration that the defendants' scheme to increase rents was ultra vires. After entering a conditional appearance, the defendants applied to have the writ struck out and all proceedings stayed, on the ground that the action was not properly constituted as a representative action. Glyn-Jones J. made an order staying the proceedings. On appeal:—

Held, that to bring a representative action under R.S.C., Ord. 16, r. 9, it must be shown: first, that all the members of the class had a common interest; secondly, that they all had a common grievance; and thirdly, that the relief was in its nature beneficial to them all. Whether all the tenants had a common interest or not, they did not fulfil the second and third qualifications. The nature of the defendants' scheme to increase rents was that the more affluent tenants would, in effect, subsidize the less affluent; there were two classes of tenants whose interests were not only not identical but in conflict, and the relief sought was not beneficial to them all. The case accordingly did not fall within the strict terms of Ord. 16, r. 9. The bracketed words in the writ should be struck out, so that the action should proceed not as a representative action but as an action brought by four individuals.

Quaere, whether in any circumstances for the purposes of any dispute a body of persons such as the tenants of the council houses of the defendants were capable of forming a class on whose behalf a representative action could properly be brought.

Duke of Bedford v. *Ellis* [1901] A.C. 1; 17 T.L.R. 139 distinguished.

Order of Glyn-Jones J. varied.

APPEAL from Glyn-Jones J.

The four plaintiffs were all tenants of dwelling-houses provided by the defendants, the Corporation of Cardiff, under the Housing Act, 1936. On June 8, 1953, the defendants passed a resolution to increase the rents of their tenants in order to balance their housing account in accordance with the obligations imposed on them by the Housing Act, 1936. The defendants had more than 13,000 tenants. They served on each of them a document dated June 26, 1953, giving notice of the defendants' scheme to increase rents. The proposal was not to increase all rents, but to increase rents having regard to the individual financial circumstances of the tenants. The maximum increase was 12s. 6d. a week. The lower paid tenants, of whom it was estimated there were some 5,000, would suffer no increase under the scheme. The tenants, who did not wish to pay the increase, were required to fill up a form giving full particulars of their financial circumstances. The scheme was badly received by the tenants and a tenants' protection association was formed.

The four plaintiffs, with the support of some 9,000 other tenants, began this action for a declaration that the proposed scheme of rent increases was ultra vires the defendants and for an injunction to restrain the defendants from putting the scheme into operation. In the writ, after the names of the four plaintiffs, there appeared in brackets the words: "suing on behalf of "themselves and all other tenants of houses provided by the "defendants under Part V of the Housing Act, 1936." The defendants applied to have the writ struck out and the proceedings stayed on the ground that the plaintiffs, in the circumstances of the case, were not entitled to bring a representative action.

Glyn-Jones J. made an order striking out the writ and staying all further proceedings.

The plaintiffs appealed.

Kenneth Diplock Q.C. and *Ralph Millner* for the plaintiffs. The plaintiffs, as four of the tenants of the defendants, can under the R.S.C., Ord. 16, r. 9, bring a representative action on behalf of themselves and all other of the defendants' tenants. All the tenants have the same interest, because they are the tenants of the same landlord, who is under the same statutory duty to them all. The scheme reorganizing rents which the plaintiffs seek to attack contains the same offer to all the tenants. They have a sufficient common interest for a representative action to be brought. This case is similar to *Duke of Bedford* v. *Ellis*.[1] For the purpose of this application it must be assumed that the scheme, which the defendants seek to put into operation, is ultra vires. The defendants could defeat any action by an individual tenant by giving him notice to quit. The present procedure was adopted in *Belcher* v. *Reading Corporation*.[2] If this scheme comes into operation, 8,000 tenants will suffer an increase in rent and, although the remaining 5,000 tenants will not immediately have their rents increased, they are potentially liable to an increase if their financial circumstances change. The fact that if this scheme is not brought into operation the rents of all the tenants may be increased is not a matter material to be considered on this application. No tenant will be in a better position as a result of this scheme. Glyn-Jones J. was wrong in drawing the inference that an alternative scheme, which the defendants might seek to put into operation, would be more detrimental to some tenants. All the tenants will have to fill up the defendants' form stating their financial circumstances. That of itself gives to them a common interest. [Reference was made to *Price* v. *Rhondda Urban District Council*[3] and *Jones* v. *Cory Bros. & Co. Ld.*[4]]

---

[1] [1901] A.C. 1; 17 T.L.R. 139.

[2] [1950] Ch. 380; 65 T.L.R. 773; [1949] 2 All E.R. 969.

Section 71 of the Housing Act, 1936, as amended by the Housing Act, 1949, imposes a duty on the defendants to provide housing accommodation. The tenants of the houses provided pursuant to that statutory duty are a class of persons having a common interest; they do not cease to be such a class because they are subject to being given notice to quit. The question in this action is whether some tenants can be made to subsidize other tenants. It is contended that the defendants are not entitled, having regard to the provisions of section 85 of the Act of 1936, to do that. The defendants have notified their tenants that they can only remain in occupation of their houses if they pay an increased rent, which the plaintiffs contend the defendants have no power to charge. The tenants thus constitute a class in respect of which a representative action will lie. If the action succeeds all the tenants will remain liable to pay only the basic rent and will not be liable actually or potentially to pay a higher rent. The fact that some of the tenants may prefer to make their own bargain with the defendants does not prevent a representative action being brought: *Colman* v. *Eastern Counties Railway Co.*[5] The proper remedy for a tenant who opposes the action is to apply to be joined as defendant. In fact no tenant has stated that he does not approve the action. The plaintiffs have not to prove that each of the 13,000 tenants has authorized this action. What will be the ultimate effect, if the plaintiffs obtain the relief they seek, is a matter of speculation.

H. Edmund Davies Q.C. and *David Pennant* for the defendants. All the tenants have not a common interest. Their interests arise under separate contracts of tenancy with the defendants. Their position is different from that of the growers in the *Duke of Bedford* case.[6] No tenant has an interest in the basic rent of any other tenant not being increased. On the contrary, each tenant has an interest in the rents of the other tenants being increased, because the defendants must not make a profit from their housing. The greater the rents payable by some tenants, the less will be the rents payable by others. The case is distinguishable from that of an action by shareholders who are interested in a common fund.

---

[3] [1923] 2 Ch. 372; 130 L.T. 156.

[4] (1921) 56 L.J. 302.

[5] (1846) 10 Beav. 1.

[6] [1901] A.C. 1.

Secondly, all the tenants have not got a common grievance. Five thousand tenants will not be affected by the defendants' scheme. Their position is not the same as that of the 8,000 tenants who will have to pay a higher rent. If this scheme does not come into operation, the result will be that these 5,000 tenants will exchange the certainty that they will not pay a higher rent for a possibility that their rents may go up.

Thirdly, the relief sought is not in its nature equally beneficial to all the tenants. The Housing Act, 1936, imposes a duty on the defendants to balance their housing revenue account. The present deficit must be met either from the tenants or by an increase in rates. The 5,000 tenants who do not suffer any increase under the present scheme may be worse off under any other scheme.

EVERSHED M.R. On July 22, 1953, a writ was issued against the Lord Mayor, Aldermen and Citizens of the City of Cardiff, the plaintiffs being described on the face of the writ as follows: "Herbert William Smith, Trevor Spickett Roberts, John "Waters, and William John Williams (suing on behalf of them-"selves and all other tenants of houses provided by the "defendants under Part V of the Housing Act, 1936)." The writ claimed a declaration that a decision made on or about June 8, 1953, by the defendants, purporting to authorize the introduction and operation of a scheme for certain specified increases of the rents payable by the tenants of council houses was ultra vires and void; and there was an alternative suggestion that it was in part, if not wholly, so void. By the second paragraph of the writ the plaintiffs sought an injunction to restrain the defendants, their servants and agents from carrying out this scheme or from carrying it out so far as it was held to be ultra vires; and an interim injunction was sought on the face of the writ.

The defendants proceeded to apply, after entering a conditional appearance, to have the writ struck out and all proceedings stayed on the ground that the action was not properly constituted as a representative action—that is to say, that the action was not one which fell within the ambit of R.S.C., Ord. 16, r. 9. That Order reads: "Where there are numerous persons having "the same interest in one cause or matter, one or more of such "persons may sue . . . on behalf of or for the benefit of all "persons so interested." The question which now arises for our determination is whether, in the circumstances of this case, the conditions of that rule are satisfied—whether this is a case in which "there are numerous persons having the same interest "in one cause or matter."

The problem is easy to state, but it has proved somewhat difficult to determine. As a foundation, however, for what follows, I must state a little more fully what are the relevant facts. We have been told that the total number of the tenants of houses provided by the defendants in accordance with their obligations under the Housing Act, 1936, amounts to more than 13,000. It is not proved what are the forms of the various tenancies; but it has been assumed during the course of the argument, and I will assume for the purposes of this judgment, that the contracts of tenancy, so far as relevant, are in all 13,000 cases the same. The rents, of course, would vary according to the size and location of the premises, but otherwise I will assume that the conditions of the tenancy and the circumstances in which the tenancies may be determined are in all cases the same. Since the various tenants are tenants of a local authority, they would not be entitled to the protection of the rent restriction legislation; so that, on the footing that all these are weekly tenancies (and again I so assume), the right of any tenant is to remain in these premises so long as he conforms with the conditions of the tenancy agreement, but subject to the right of the council to determine his tenancy on giving a week's notice.

The scheme, which is the subject of the attack in the writ, is to be found set out in a document dated June 26, 1953, a copy of which, as I understand, was sent to every one of the 13,000 tenants. The defendants (as other local authorities) are under statutory obligation not only to provide housing accommodation, but also to try (in the common phrase) "to make ends meet," and they therefore came to the conclusion that their obligation in the latter respect could not be fulfilled unless there were some increases in the rents they were receiving for the council dwellings. The scheme which they put forward is designed to give an increased rental income, but to distribute the burden among the various tenants in accordance, not with the location or size of the premises, or not at any rate entirely so in accordance, but in part in accordance with the ability of the tenants respectively, having regard to their individual financial circumstances, to pay. Whether that is a just or fair arrangement it is not for this court to say. It may involve problems of political or social philosophy which might be strongly debated—whether it is right, as was put in the course of the argument, that a millionaire should pay more for a loaf of bread than an old-age pensioner—but at any rate that is the principle which lies behind this scheme, that the increases which are to be imposed will depend (at any rate to some extent) on the ability of the tenants to pay. I gather that this is not the first occasion on which a scheme of this sort has been put forward by a local authority.

It is, however, quite obvious that, assuming such a scheme to be fair and just, it must be justly administered; otherwise the conscientious and truthful would suffer at the hands of the less scrupulous; and, for that reason, the defendants had to put forward some means whereby they could ascertain the exact circumstances of the individual tenants. The questionnaire, which fair administration required to be answered, involved a searching inquiry into the personal circumstances of all the individual tenants. They were required to state in great particularity the exact income which each of them was receiving from all sources, except some excepted sources like national insurance or pension. They were required to give full information not only about their own financial circumstances but about the condition and earning capacity of their families, so far as they were resident with them; and in order, no doubt, to provide some form of sanction, the document contained in leaded type the following statement which the tenant was required to sign: "I hereby "declare that the above statement is true and correct and I "understand that the giving of incorrect information herein or "failure to notify any change which will affect the rent charge "may be regarded as good reason for terminating the tenancy." They were also informed that, if they did not choose to fill in the form, they would be assumed to be liable for the maximum increase.

It is a common fact of human relations that ordinary men and women will always tend to dislike being charged more for something for which they have hitherto paid less. It is also a common fact of human relations that a great many people strongly dislike having to give information of this detailed character about themselves, their families and their financial circumstances; and it is therefore, perhaps, not surprising that this notice sent out to the 13,000 odd tenants of the defendants received a somewhat hostile reception. We have been informed that meetings took place, that a tenants' protection committee was formed, and we have, indeed, evidence that no fewer than

9,000 persons have signed a document expressing their approval of the present proceedings.

It was in those circumstances that the writ was issued in the form which it takes. I might perhaps add this: Mr. Millner, who appeared for the plaintiffs, was not entirely inexperienced in matters of this kind, since he appeared for the plaintiffs in *Belcher* v. *Reading Corporation*,[1] an action in which tenants sought to challenge the validity of what Reading Corporation had been disposed to do, and the form of action there selected was a representative action. In that case (as is apparent from what occurred before Harman J. during interlocutory proceedings) a question arose of the propriety of a representative action in circumstances such as the present. Counsel for Reading Corporation submitted that in strictness the case did not fall within the ambit of Ord. 16, r. 9, but stated that Reading Corporation were not disposed to object to the form of proceeding: it was obviously desirable that the matter which had been raised should be speedily determined; and, as the judge himself said, a representative form of action, as distinct from, or as an alternative to, what is called a test action, was a convenient form of proceeding. If Mr. Millner expected the defendants to be as accommodating as Reading Corporation, he has proved to have been mistaken.

There is no doubt that, in other branches of the work of these courts, actions on behalf of a group of persons, who all have similar rights, are found convenient. My brother Morris, in the course of the argument, asked whether it was not a fact that actions are brought in this way by the owners of cargo in a particular ship; and he has since found an example of such a case: see *Morrison Steamship Co. Ld.* v. *Greystoke Castle (Cargo Owners)*.[2] The procedure in that class of litigation is no doubt of a somewhat special character; but I refer to it because I wish to make it plain that nothing that I say in this case should be taken as casting any doubt upon the propriety of actions of that character in cases of the kind to which my brother alluded. I am bound to say that I am entirely unconvinced that there is any substance whatever (as a practical matter) in the objection taken in this case by the defendants. It seems to me not to matter to the defendants a straw whether the form of action is as it is at present constituted or whether it takes some other form.

[1] [1950] Ch. 380; 65 T.L.R. 773; [1949] 2 All E.R. 969.

[2] [1947] A.C. 265; 63 T.L.R. 11; [1946] 2 All E.R. 696.

The plaintiffs in the action were anxious to obtain an interim injunction. They did not succeed, and I am not at all surprised that they did not. In any claim for an interim injunction in a case of this kind, one matter which would be likely to arise would be the problem of any undertaking as to damages should the plaintiffs ultimately prove to be wrong; and since we are informed that the increased rents, if brought into operation, would be equivalent to some £45,000 per annum, it is not surprising that the plaintiffs might be in some difficulty in finding adequate security for an undertaking to indemnify the defendants, if they were wrong. But again, I am not for myself satisfied that the insistence of the plaintiffs upon a representative form of action was very material to the question of an interim injunction. It is true that, if the action were simply brought by one, two or three individuals and a claim made for an injunction, then strictly any injunction would be limited to benefiting those individual plaintiffs. On the other hand, and as a practical matter in a case of this kind, if any injunction was granted at all, it would obviously be very difficult for the defendants to proceed with 12,996 other tenants, while restrained as regards the four plaintiffs; since they would be liable immediately to receive writs from the other tenants. But I can also, from the plaintiffs' view (and it is fair to say this) understand some reluctance in the part of an individual weekly tenant to embark, on his own, upon litigation with the defendants; for he might think that their answer might be forthwith to serve him with a notice to quit and then to contend that the plaintiff had no subject-matter which enabled him competently to maintain his action.

These matters are perhaps by the way, though they will have a relevance when I come to deal with costs. The question which we have to determine is whether this case is one falling within the scope of Ord. 16, r. 9. At first blush I think that one might be disposed to say that if there are 13,000 weekly tenants with tenancies (so far as relevant) in identical form, then the case is one which the rule would be designed to meet, on grounds at least of convenience. But, on second thoughts, I think that one's inclination would at once be in the other direction; for, taking the rule according to its own language and without for the moment considering any expositions of it in the decided cases, it is not easy to see how these 13,000 individual tenants can be said to have "the same interest in one cause or matter." The truth is that they have very similar or, if you like, identical, interests in very similar or identical matters. It is, I think, very important to bear in mind the strict legal position. The document issued by the defendants speaks of increasing rents; and, as a matter of practice and of ordinary decencies, the defendants would not seek to evict the whole of their existing tenants and then offer to the world at large new tenancies on the new terms. They would naturally prefer that the existing tenants should remain, offering them the continuation of their occupancy on terms of their paying increased rents. But, in strictness, the rents are not capable of being increased unless, first, the tenancies are determined, and then new contracts will or may come into operation. If the offer of the new contract is at a rent which afterwards it is found the defendants have no power to charge, it may be that the result will leave no contract at all. But, at the moment of the issue of the writ, the position of these 13,000 persons was that they were all of them weekly tenants: their only right was to remain as weekly tenants until such time as the defendants gave notice to determine those tenancies. In actual fact, all of the tenancies have since been determined as a necessary preliminary to putting into effect the scheme; and, when the tenancies are determined, it may be said that the ex-tenant has no more right to continue in occupation of his house on the terms offered than any other person who may come along and ask to be taken on as a tenant of one of the houses according to the terms of the new scheme.

That consideration is, I think, of significance when one looks at the decided cases to which our attention has been drawn. The leading case is *Duke of Bedford* v. *Ellis* [3] in the House of Lords. That was a case in which a number of persons, a class of persons —there were in fact two or three classes, but for simplicity I think that it will be sufficiently accurate if I treat them as one class—called growers of vegetables and like products, was concerned, under a statute passed in the year 1828, with the rights and obligations of the Duke of Bedford as owner of the Covent Garden Market. The allegation in the action (and we examined, with Mr. Diplock's assistance, the full report of the matter in the Court of Appeal [4]) was that the Duke of Bedford had disregarded his obligations under the Act of 1828, and it was said that under that Act this class of persons called "growers" (distinct, that is, from merchants or middlemen) was given preferential rights to have certain stands and places of business in the Covent Garden Market. It was also alleged that the tolls

[3] [1901] A.C. 1; 17 T.L.R. 139.

[4] [1899] 1 Ch. 494.

which the Duke of Bedford might exact from growers in respect of those places of business were limited by the statute and had in fact been exceeded by him. The writ, therefore, asked for declarations, first to the effect that this class, known as "growers" (which was very numerous—about 10,000 in one subclass alone) had a preferential right by statute. A declaration was also sought to the effect that the tolls exigible from this class of persons were limited in certain respects; and the individual plaintiffs (for this was a matter which was only open, of course, to the individual plaintiffs) also claimed the return of the excess tolls they had individually paid.

It will be observed at once that there is a distinction between that case and the present. The class there was a class of persons who had by statute a certain preferential right, namely, a right to be offered stands in the market in priority to non-growers and other persons. The right of any individual rested upon his being, but belonged to him as, a member of that class. There was only a small number of stands; so that the chances of any individual in fact getting a stand were, of course, very small; but still, the statutory right alleged was a right belonging to a class and all its members, as in the case—with which those who practise in the Chancery Division are familiar—where under an intestacy one of the next-of-kin has a right to a share in the estate as being a member of a class of the next-of-kin.

It was in the light of those circumstances that Lord Macnaghten (who delivered the leading opinion in the House) used the language which has been much pressed upon us here. He said this [5]: "If the persons named as plaintiffs are members of a class "having a common interest, and if the alleged rights of the class "are being denied or ignored, it does not matter in the least that "the nominal plaintiffs may have been wronged or incon"venienced in their individual capacity"; and then later the matter is summarized in this sentence: "Given a common "interest and a common grievance, a representative suit was in "order if the relief sought was in its nature beneficial to all "whom the plaintiff proposed to represent." That latter sentence was spoken in fact of the old Chancery practice before Ord. 16, r. 9, came into operation. But I am content to take it (as Mr. Edmund Davies for the defendants was content to argue it) that the necessary qualifications in that sentence are applicable here and must here be shown to be satisfied. It must be shown first that all the members of the alleged class have a common interest, that all have a common grievance, and that the relief is in its nature beneficial to them all.

---

[5] [1901] A.C. 1, 7, 8.

I do not propose (because I think it unnecessary) to take time by referring in any detail to all the cases upon the question: is there here a class, so that each member may be said to have the same interest in a common subject-matter? It seems to me, however, that this case, on its facts, may well be quite distinct from that of *Price* v. *Rhondda Urban District Council*,[6] where the plaintiff sued on behalf of a class, namely, married women teachers, to test the validity of a resolution of the Rhondda Council that married women teachers, as such, would not be employed or not employed save on terms which were disadvantageous to them as a class. Similarly, in another case a plaintiff sued as a member of a class, namely, underground mine workers, alleging against the mine owner that he was not fulfilling his statutory obligations to the class of underground mine workers. There are other cases (for example, *Colman* v. *Eastern Counties Railway Co.*[7]) which may perhaps go somewhat further towards making this form of procedure applicable, where a number of persons may be said to have, not the same interest in one cause or matter so much as identical interests in identical causes or matters.

I am anxious that a convenient form of procedure, which in many classes of case can usefully be adopted, should not be held by this court to be inappropriate and wrong. I therefore, without saying more, except to express my doubts upon it, will assume that it could be said here that all these 13,000 persons have the same interest, in the sense of a common interest. Still, in my judgment Glyn-Jones J. rightly concluded that the third qualification of Lord Macnaghten's dictum is not here fulfilled. The nature of this scheme makes it plain (if it be carried into effect) that the differentiation will operate so that the more affluent of the tenants will (and I use Mr. Diplock's word) "subsidize" the less affluent. Indeed, it is pointed out that some 5,000 of the 13,000 will suffer no increase of rent at all. It is true that potentially they may do so at some future date; but, of course, only if their then existing contracts are first determined. It is also true that they have to fill up this form, or, if they do not do so, they will cease to be the over-privileged and become the under-privileged. Still, when one does apprehend that the main characteristic of this scheme is that the more affluent will, so to say, subsidize the less affluent, it is at once apparent that there are two classes whose interests are not only not identical but are in conflict, namely, the subsidizers and the subsidized.

---

[6] [1923] 2 Ch. 372.

[7] (1846) 10 Beav. 1.

I agree with Glyn-Jones J. that it would be shutting one's eyes to realities to suppose that if the plaintiffs succeed in this action they will all continue to remain at what are called in the scheme the basic rents; and that the defendants will be so defeated that they will fail to think of some other scheme for implementing their obligations to make ends meet. Indeed, any possible alternative scheme, such as was adumbrated in one affidavit, shows that there will be a considerable class, whom the plaintiffs now purport to represent, who are almost certain to be worse off if this scheme be held invalid than they will be under the scheme itself. But I need not, I think, pursue the matter beyond pointing out that there are, apart altogether from those in an intermediate position, two distinct classes whose interests are in conflict—those who will benefit by having no increases or no present increases on the one hand, and those who will have what may be called inflated increases on the other. I therefore prefer to base my conclusion that this case does not fall within the strict terms of Ord. 16, r. 9, upon that point rather than deciding whether it fails in limine, because there is here no class of persons "having the same interest" in any cause or matter.

But I am bound to say that in a case of this kind I am not sorry to reach the conclusion at which I have arrived. I confess that it seems to me startling, if this claim to bring the case within Ord. 16, r. 9, is correct, to note what the consequences might be. An example was taken of the season ticket holders of British Railways between London and, say, Folkestone. If one individual sought to challenge the validity of some increase in the season ticket rate, he could apparently (if the plaintiffs are right) bring an action on behalf of all the season ticket holders, whether they liked it or not. The remedy, Mr. Diplock says, is adequate and simple—though I doubt if it would seem so to a great many people. The person who says: "I do not want to be represented "by you" can (says Mr. Diplock) ask to be joined as a defendant. It seems to me that such a result involves a serious inroad upon the ordinary individual's liberty to make his own terms with some other party with whom he is under no obligation to make any contract at all, if he does not want to.

The result, however, is that in my judgment this case is not one which is within Ord. 16, r. 9. But it does not follow that it is right to strike out the whole of the proceedings. I have already expressed my view, and I repeat it, that I cannot in the least see that it matters to the defendants what the form of action is, certainly now that any question of an interim injunction is out of the way. Mr. Edmund Davies was quite willing (but after I had pressed him) to say that the defendants would be content, if the bracketed words were omitted from the writ, to treat this as a test action, and stated that they would not in fact seek (in popular language) to victimize the four individuals who have stood out as the champions of the tenants of these houses—certainly champions of the 9,000 of them who have signified their support to the action taken by the four plaintiffs. But he was only willing to do that on terms that the plaintiffs paid the whole of the defendants' costs up to date.

We therefore have had to consider the matter and express our view upon it. In the circumstances I think that the right course is not that the writ should be struck out and all proceedings stayed. It is conceded that this court has the power and jurisdiction to order, in lieu of striking the proceedings out, that the bracketed words should be struck out, so that the action can proceed, not as a representative action, but as an action brought by four individuals against the defendants; and that, in my judgment, is what we ought to do, varying Glyn-Jones J.'s order accordingly. Since that result is achieved not by agreement but by direction of the court, it is not competent to impose terms on the defendants; but I have no doubt whatever that the defendants, having a very difficult task to perform under this statute, and being (as Mr. Edmund Davies said) anxious to get this question determined, will not do otherwise than treat this as a test action and will not seek to defeat these four plaintiffs by what is called victimization. Indeed, if they did, they would not really advance much further on the road; for other champions would be found (I doubt not) to spring up from the soil. That, then, is, in my judgment, the order which we should make.

There remains, however, the question of costs. I greatly regret that it has been necessary in this very important matter that the costs of an appeal to this court should have been incurred. Both parties took up attitudes which no doubt made it inevitable; and, as Mr. Edmund Davies said, he was brought here by the plaintiffs appealing against Glyn-Jones J.'s order striking out their writ altogether. In the circumstances, I think that there is no good ground for disturbing the effect of the order as to costs which Glyn-Jones J. made, but I do not think it right that the plaintiffs should be made now to pay the defendant's costs of this appeal. I think (and in saying this I am not to be taken as suggesting that the defendants have not acted to the best of their ability as guardians of the ratepayers' interests and the ratepayers' money) that, doing justice in the case as best I can between these plaintiffs and the defendants, the just order would be that the defendants' costs of this appeal should be their costs in the action. The result of that would be that, if the defendants eventually win this case, they will get these costs; if, however, they lose and the plaintiffs win, then the plaintiffs will not have to pay the costs of this appeal.

I therefore think that the order should be as I have suggested; that, in lieu of striking out the proceedings, the writ should be amended by striking out the bracketed words (making it a representative action) and that the defendants' costs of this appeal should be their costs in the action.

JENKINS L.J. I agree. Mr. Diplock's argument for the plaintiffs was to the effect that the 13,000 tenants of the houses provided by the defendants in performance of their statutory duty under the Housing Act, 1936, constituted a class of persons having a common interest, because they each of them stood in the relationship of tenant to a common landlord, namely, the defendants, and their tenancies alike fell to be regulated by any provisions of the Housing Act, 1936, applicable to the case. He said, in effect, that the common interest of these 13,000 persons consisted in the right to remain in occupation of their respective houses at no higher rent than the defendants could lawfully charge having regard to the provisions of the Act. He said, further, that these 13,000 tenants have a common grievance, in that the scheme, the validity of which is challenged in the action, purported to propose for all of them, without exception, some increase, either actual and immediate or contingent and future, in the amount of the rent payable by them; and, finally, inasmuch as the object of the action was to prevent the scheme being brought into effect, the action was for the benefit of all, for, if successful, it would prevent the increases, actual or potential, foreshadowed in the scheme.

Mr. Edmund Davies, for the defendants, went so far as to argue that these 13,000 persons could not, for the purposes of any dispute, constitute a class on whose behalf a representative action could properly be brought. He founded himself on the contention that here there is not a class of persons entitled to a common right conferred upon members of that class by, for example, an Act of Parliament (which was the position in the *Duke of Bedford's* case [8]), and there is not any common right properly so called. He said, in effect, that here there was no more than an aggregate of individuals, each bound to the defendants by a separate contract of tenancy peculiar to himself and conferring and imposing rights and obligations upon him separately as an individual and not as a member of a class.

I am not prepared to accede to Mr. Edmund Davies's argument in its widest form, and I find it unnecessary (as does my Lord) for the purpose of deciding this case to determine whether in any, and if so what, circumstances or for the purposes of any, and if so what, dispute a body of persons such as the tenants of the council houses in the present case are capable of forming a class on whose behalf a representative action can properly be brought. The only questions which it is necessary to answer for the purpose of deciding this case are whether these 13,000 tenants are a class of persons having a common interest for the purposes of this present dispute, and, if so, whether, for the purposes of this present dispute, they can be said to have a common grievance, and, if so, whether the relief claimed in relation to this present dispute is in its nature beneficial to all.

If the matter is put in the way in which it was put by Mr. Diplock it has, if I may say so without offence, a specious appearance of being a case in which (on the assumption that the charge of ultra vires can be made good) all these tenants are labouring under a common grievance, namely, the threat of an increase, actual or potential, in the amount of the rent payable by them over and above the amount lawfully exigible. But while at this stage it is not for us to investigate the merits of the action, I apprehend that, in order to determine whether the action is properly constituted as a representative action, it is necessary to look into the nature of the dispute far enough to be able to see what the true character of the alleged grievance is. On doing that in this case, it immediately appears that though the grievance, for the purposes of justifying the form of proceedings, is put as a threatened increase, actual or potential, in the amounts of all the rents, the true grievance is not that. It is not, and could not, I apprehend, be contended that the defendants have no power to increase the rents at all in any circumstances. The true grievance is not that rents are here being increased but that rents are here being increased not upon a uniform but upon a differential basis, the scheme being that a tenant in receipt of a gross income at the rate of £500 per annum or over and less than £600 shall suffer an increase of 8s. 6d. a week, and a tenant in receipt of a gross income at the rate of £600 per annum or over shall suffer an increase of 12s. 6d. a week, with other provisions to meet the cases of adult wage- or salary-earning children, any wages earned by a wife, and the presence of lodgers or sub-tenants, or of what are termed "additional families," by the increases considered appropriate in each of those contingencies, and an overriding maximum increase of 12s. 6d. per week.

---

[8] [1901] A.C. 1.

As I have said, what is objected to in that scheme is that, instead of charging a uniform increase in rent (measured, I suppose, by reference to the estimated letting value of the house, and the necessity of charging an economic rent and of providing for increased outgoings, or other objective considerations of that nature), this scheme charges rent by reference to the purse, and as such it is said to be ultra vires. It was put by Mr. Diplock that it was beyond the powers of the defendants to charge differential rents according to the means and circumstances of the tenants, because the result of that would be that some tenants, those in more affluent circumstances, would, in effect, be subsidizing by the increases in rent imposed in their cases the tenants in less affluent circumstances in whose cases no increase was to be made at all.

That being the true nature of the grievance, it seems to me impossible to maintain that in this particular dispute these 13,000 tenants constitute a class having a common interest in any relevant sense: it seems to me impossible to maintain that they have in this dispute a common grievance or that the relief sought is beneficial to all. On the contrary, it seems to me necessarily to follow that a tenant who under this scheme qualifies for the subsidy (if I may so put it)—that is to say, a tenant whose rent is not increased—has an interest which is, or may be, diametrically opposed to that of a tenant who suffers the increase. Prima facie, it is in the interests of the subsidized tenants—that is to say, the less affluent of them who suffer no increases in rent—that this scheme should be upheld and put into operation in order that they may enjoy the benefit of it by (as it may be put) being allowed to remain as tenants at the old rent, and having the deficit which the defendants are obliged so far as possible to make good provided by other tenants whose means are such as to bring them within the range of one or other of the increases.

Therefore, while deciding nothing as to the possibility of such an aggregate of individuals as the 13,000 tenants here constituting a class on whose behalf a representative action could properly be brought in relation to some matters, I hold that with regard to this particular matter it is impossible to say that they are such a class.

I have only to add that I agree with the order my Lord proposes as regards the costs of this appeal, and I agree with him also that the writ should not be struck out, but that leave should be given to make the appropriate amendments in order that the action may go forward as an action brought by the four named plaintiffs as individuals and not in any representative capacity.

MORRIS L.J. I agree. The writ claimed a declaration that the decision of the defendants to introduce a scheme for differential rents was beyond the powers of the defendants. With the merits of the dispute that has arisen we are not in any way concerned. Nothing in the decision today affects the merits of the matter which will have to be decided. We have been concerned with a question which has arisen in a preliminary skirmish in the litigation. It concerns merely a bald point of procedure, in regard to which it has seemed to me that success does not profit and defeat does not hurt.

The writ does, however, direct attention to a particular scheme, and, therefore, while the merits of the dispute which will have to be decided are not before us, we have to look at the scheme in order to see whether a representative action can properly be brought. It seems to me that a mere perusal of the scheme shows that there are many tenants who are not today, and may not ever be, adversely affected, so far as their rents are concerned, by this scheme. There is nothing I can add to the reasons which have already been assigned by my Lords in support of the view that the relief sought in this case is not in its nature beneficial to all tenants. It seems to me that a mere examination of the scheme demonstrates that. Furthermore, in regard to the scheme itself, I think that there is a very great force in Mr. Edmund Davies's submission that it is shown that all the tenants have not got a common grievance.

C. A.
1953
SMITH
v.
CARDIFF
CORPORATION.

For these reasons I think that the judge came to a correct conclusion in regard to the main matter. I find myself in full agreement with what my Lords have said, and I concur in the course that is proposed in regard to the writ and also in the order in regard to the costs.

Order below discharged in so far as it ordered stay of proceedings; writ to be amended by striking out the words "suing on behalf of "themselves and all other tenants of houses "provided by the defendants under Part V "of the Housing Act, 1936."

Solicitors: *Wrentmore & Son for Thomas John & Co., Cardiff; Theodore Goddard & Co. for Sidney Tapper Jones, Town Clerk, Cardiff.*

B. A. B.

C. A.
1953
Nov. 12, 13, 16.
Singleton, Birkett and Hodson L.JJ.

HAWKSLEY *v.* FEWTRELL AND ANOTHER.

[1951 H. No. 495.]

Practice and Procedure—Jury—Civil action—Verdict taken by associate in judge's absence—Validity of verdict—Undesirability of practice —"Open court"—"Privy verdict."

The judge in a civil action ought to be available to assist the jury while they are deliberating, and ought to be present in court to receive their verdict; but such a verdict is not rendered a nullity if it is received by the associate of the court when the judge is absent. The practice by which the associate may take the verdict of the jury is one established for general convenience in civil actions and has been evolved over the centuries as part of the historical process of relaxing the strict rules applicable to juries laid down in Coke on Littleton 227b and Blackstone's Commentaries, iii, 377.

Fanshaw v. *Knowles* [1916] 2 K.B. 538 distinguished.

Dicta of Scrutton J. in *Fanshaw* v. *Knowles* [1916] 2 K.B. 538, 549–50, and of Scrutton L.J. in *Banbury* v. *Bank of Montreal* [1917] 1 K.B. 409, 442; 33 T.L.R. 104 followed.

Decision of Finnemore J. affirmed.

APPEAL from Finnemore J. and a jury.

In February, 1950, Harry Stephen Ronald Hawksley, a law student, was arrested by two police constables and brought before the Lambeth magistrates on a charge of loitering with intent to commit a felony under section 4 of the Vagrancy Act, 1824, as amended. He was acquitted, and thereafter brought an action for damages for malicious prosecution and false imprisonment against the two police constables, Douglas Fewtrell and Eric Saunders, as defendants.

The plaintiff, by his statement of claim, alleged that, as the defendants well knew, he was not a suspected person and that at no material time was he in any of the places in which the defendants alleged that he had been loitering. By their defence the police constables denied that the arrest of the plaintiff had been unlawful; they alleged that on the day of his arrest they had kept him under observation at or near certain premises and that his demeanour and behaviour had been such as to make them suspect that he was contemplating the commission of a crime or other breach of the peace; that he thereby became a suspected person within the meaning of the Act of 1824; and that they thereafter found him loitering about in other premises with intent to commit a felony. Alternatively, they pleaded that they honestly believed on reasonable grounds that they were justified as police constables in making the arrest and were under a statutory duty to do so.

The action was heard before Finnemore J. and a jury on April 16 and 17, 1953. On the second day of the hearing, at the conclusion of the evidence, the judge asked counsel for both parties whether they desired to have questions left to the jury or to have them directed generally. He said that he proposed to tell the jury that the whole case depended on whether they believed the plaintiff's story that he was never in the roads mentioned. If the jury so believed, then, said the judge, there was no reasonable and probable cause for arresting him; but if they did not accept the plaintiff's evidence and did accept that of the police, he would tell the jury as a matter of law that that would be a reasonable and probable cause, and that there would be no evidence of malice and therefore no evidence of malicious prosecution and false imprisonment. Counsel for both parties agreed to that procedure.

The judge then summed up and the jury retired at 3.35 p.m. on Friday afternoon, April 17, 1953, and returned to the court room at 6.12 p.m. The judge was not present, having left the court and also the precincts. When the jury returned, the associate said: "Members of the jury, are you agreed upon your "verdict?" The foreman of the jury replied: "Yes we are."

The associate: "Do you find for the plaintiff or for the defendants?" The foreman: "We find for the defendants." The associate then thanked them and discharged the jury.

On the following Monday morning the judge, at the request of counsel for the defendants, directed that the formal verdict be entered for the defendants, with costs. Counsel for the plaintiff (Mr. Leonard Halpern) objected, submitting, on the authority of *Fanshaw* v. *Knowles*,[1] that the judge having been absent, the verdict given to the associate was an informal or privy verdict, and he moved for a new trial, inasmuch as there was before the judge no final formal verdict, and that none could now be obtained, since that jury was no longer in existence. He also referred to a note in the Annual Practice (1952, pp. 619–20) under R.S.C., Ord. 36, r. 39, and to the case cited above.

Finnemore J. said that he did not think that there was anything in the point. *Fanshaw* v. *Knowles* [1] had shown that the strict rules applicable to the taking of a verdict from a jury in a criminal case did not apply in the same measure to a civil jury. Apart from that, he added, it had happened in many cases that a jury had deliberated for a long time and that the judge had not been present when they came back; and that it had long been the practice that if the jury had given a straightforward verdict, as in the present case, with no qualifications and no point calling for legal argument, the verdict had been accepted as the verdict of the jury, and in due course formal judgment had been asked for and entered. That was what he proposed to do here; and he directed that judgment be entered for the defendants.

The plaintiff appealed on the ground, inter alia, that the judge was wrong in law in directing that judgment be entered for the defendants on April 20, 1953, when no verdict of the jury had been taken from them by the judge prior to their discharge on April 17, 1953.

[The case is reported only on the main point of appeal, whether in the circumstances the absence of the judge rendered the verdict of the jury a nullity.]

H. V. Lloyd-Jones Q.C. and *Leonard Halpern* for the plaintiff. The judgment directed to be entered for the defendants was not valid and was, indeed, a nullity, for unless the judge was present there was not an open court but only a court house: see Blackstone's Commentaries, iii. 377, 12th ed., from which it is to be

---

[1] [1916] 2 K.B. 538.

C. A.

1953

HAWKSLEY v. FEWTRELL.

implied that "open court" means when the judge is sitting; and see also Bacon's Abridgment, vol. I, p. 555, and vol. III, p. 739, as to the duty of judges to hold their courts in their proper persons. The authorities show that, though the associate could take a privy verdict, it was required to be made public later by a formal verdict in the judge's presence: *per* Lord Reading C.J., citing Coke on Littleton and Blackstone, in *Fanshaw* v. *Knowles*.[2] Scrutton J. in *Fanshaw's* case[3] and Scrutton L.J. in *Banbury* v. *Bank of Montreal*[4] expressed disapproval of the judge being absent when the jury returned their verdict. The judge here delegated the taking of the verdict and the discharge of the jury to the associate quite deliberately, and, while it is conceded that that may be proper where the issues have been narrowed down to one simple question, the position might have arisen where the jury wished to ask further questions or for further directions. As the associate is a ministerial and not a judicial person, such delegation is clearly not correct.

Richard Elwes Q.C. and *W. W. Stabb* for the defendants. The authorities show that for more than 100 years a verdict in a civil action taken by the associate in the absence of the judge has been held to have the necessary quality of finality: see *Bentley* v. *Fleming*,[5] where by the agreement, and *Doe* d. *Lewis* v. *Baster*,[6] where by the tacit permission of counsel, the associate was authorized to take the verdict in the absence of the judge. In *Baker* v. *Oakes*[7] Amphlett J.A.[8] referred incidentally to the practice of verdicts being taken in the judge's absence by an officer of the court. A judge who leaves the court before the jury return their verdict does so at his risk, and it is not sought to qualify the disapproval expressed by Scrutton L.J. A privy verdict, which was considered in its historical aspect in *Fanshaw* v. *Knowles*,[9] was permitted in civil cases in order to mitigate the asperities of jury service; it had an interim quality, and had to be confirmed by a public verdict. The decision in *Fanshaw's* case[9] was on an entirely different issue, namely, the separation of juries after they had retired; and though the practice of the verdict being taken in the judge's absence was criticized, no one suggested that such a verdict would have been a nullity.

---

[2] [1916] 2 K.B. 543–4.

[3] Ibid. 549–50.

[4] [1917] 1 K.B. 409, 442; 33 T.L.R. 104.

[5] (1845) 3 Dow. & L. 23.

[6] (1836) 6 Nev. & M. 541.

[7] (1877) 2 Q.B.D. 171.

[8] Ibid. 176–7.

[9] [1916] 2 K.B. 538.

C. A.
1953

HAWKSLEY
v.
FEWTRELL.

The defendants' advisers have been informed by the chief associate that before 1939, when there were more jury cases than at the present time, it was by no means unknown for a judge to leave the court before the jury had agreed on their verdict, which was then taken by the associate. It was not suggested that that happened often, but when it did no question was raised about it. It was further stated that the associates have known instances of the same practice being followed more recently.

[SINGLETON L.J. The proper practice is set out in Halsbury, 2nd ed., vol. 19, p. 360, which also refers to the statement of Atkin L.J. in *Ellis* v. *Deheer*[10] that the practice is that the verdict shall be delivered in open court. Is there authority in which "open court" is defined as such?]

See the Annual Practice, 1953, Pt. II, pp. 2001, 2002, and note.

Lloyd-Jones Q.C. in reply. The discharge of the jury was not done with the appropriate voice. The point in the present case did not arise in *Fanshaw's* case,[11] for the judge came back to the court. It is not argued that judgment cannot be entered in the jury's absence; and it is conceded that for over three centuries there has been a relaxation of the old rules in relation to juries. But in regard to the issue in the present case no practice is discoverable except one which has been frowned on by the Court of Appeal as a breach of judicial conduct. There is nothing anywhere to show that any such practice has been accepted. In *Bentley* v. *Fleming*[12] and *Doe* d. *Lewis* v. *Baster*[13] that which was done by consent of counsel gave a cloak of propriety to that which would otherwise have been wrong.

The chief associate has informed the plaintiff's advisers that judges living in London have been known to leave the court premises, but have been summoned back when the jury were ready to give their verdict, which makes it appear that the extent of the practice is limited to the judge absenting himself from the building but returning when necessary.

SINGLETON L.J. The first, and the more important, point raised on this appeal is that there was no verdict of the jury on which judgment could be given. [His Lordship stated the facts as to the verdict given by the jury on Friday afternoon, April 17,

---

[10] [1922] 2 K.B. 113, 120; 38 T.L.R. 605.

[11] [1916] 2 K.B. 538.

[12] 3 Dow. & L. 23.

[13] 6 Nev. & M. 541.

1953, the argument before Finnemore J., and his decision on Monday, April 20, 1953, and continued:]

Mr. Lloyd-Jones, for the plaintiff, asks this court to say that that judgment is wrong and that there must be a new trial. He was not able to refer us to any case in which it had been held that a verdict so given was of no effect, but he relied on that which was said in the Court of Appeal in *Fanshaw* v. *Knowles*[1] to the effect that a verdict given, or taken, in the absence of the judge is a privy verdict, and is a nullity unless it is followed by a verdict given in open court in the presence of the judge.

The decision of the court in that case was that the rule that any separation of the jury after the judge's summing-up in a criminal case invalidated their verdict did not apply to a civil case. As the headnote shows, the history of the law as to separation of juries was considered. Darling J. had put questions to the jury and had left the court before they answered them. They did not answer them all that evening, and they were told to attend again the next morning, when the judge would be present. In the morning they gave further answers, on which the judge entered judgment for the plaintiff. The defendants' appeal was dismissed. It was argued that the verdict was bad in that the jury had been allowed to separate before giving their verdict.

Lord Reading C.J. said[2]: "We have had the advantage of "an interesting and learned argument upon the subject. The "defendant has urged that the same rule must apply in a civil "trial. On the other hand it has been argued for the plaintiffs "that the old rule of law which would prevent the separation of "the jury before they give their verdict after they have retired "to consider it is one that no longer applies to civil trials; that "the rigidity of the old rule has been relaxed in civil trials, just "as it has been relaxed even in criminal trials partly by custom, "and recently by the Juries Detention Act, 1897. In Coke "upon Littleton, 227b, it is stated that 'By the law of England "'a jury, after their evidence given upon the issue, ought to "'be kept together in some convenient place, without meat or "'drinke, fire or candle, which some bookes call an imprison-"'ment, and without speech with any, unlesse it be the bailife, "'and with him onely if they be agreed. After they be agreed "'they may in causes between party and party give a verdict, "'and if the Court be risen, give a privy verdict before any of "'the Judges of the Court, and then they may eate and drinke,

---

[1] [1916] 2 K.B. 538.

[2] Ibid. 543–4.

" 'and the next morning in open Court they may either affirme " 'or alter their privy verdict, and that which is given in Court " 'shall stand. But in criminall cases of life or member, the " 'jury can give no privy verdict, but they must give it openly " 'in Court.' It is clear, therefore, that at the time of this work " being written there was a distinction to be drawn between civil " and criminal cases. In the one case, that is in the civil trial, " a privy verdict could be given, and then the jury were allowed " to eat and drink, and they could either confirm or alter that " verdict, that is that privy verdict, when the verdict was given " as a public verdict. In Blackstone's Commentaries, iii. 377, " it is stated, dealing with verdicts between party and party, " that 'A verdict is either privy or public. A privy verdict is " 'when the judge hath left or adjourned the court: and the " 'jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge " 'out of court: which privy verdict is of no force, unless afterwards affirmed by a public verdict given openly in court; " 'wherein the jury may, if they please, vary from their privy " 'verdict. So that the privy verdict is indeed a mere nullity; and " 'yet it is a dangerous practice, allowing time for the parties to " 'tamper with the jury, and therefore very seldom indulged.' "

Lord Reading continued[3]: "It appears, therefore, that " the jury when they had once agreed could return an informal " verdict called a privy verdict, and that when they had done " that they were entitled to eat and drink, as is said in Coke " upon Littleton, which was already a relaxation of the rigidity " of the old rule; and in Blackstone's time he says that when " they were agreed they gave their privy verdict in order to be " delivered from their confinement. It seems, therefore, not " only were they allowed to eat and drink if they had given their " privy verdict, but in Blackstone's time they were no longer " confined, and they could on the next morning, when they gave " their public verdict, alter the privy verdict or affirm it as they " pleased. Now that shows that when Blackstone's Commentaries were written it was clear that in civil trials juries were " allowed to give a verdict after they had separated. The progress in the liberty afforded to juries is shown by the allowance " of the release from confinement, which is stated in Blackstone, " but not in Coke upon Littleton; and even in Coke upon " Littleton a reference to the case of *Saunders* v. *Freeman*[4]

---

[3] [1916] 2 K.B. 544–5.

[4] (1560–1) 1 Plowd. 209, 211.

"shows that after there had been a privy verdict the jury were "then allowed to eat and drink and lie together. It appears to "have been by custom that juries were allowed to do this. The "words are 'and then the same juries for their ease as is the "'custom to eat and drink together for them aforesaid and to "'lie together until the morrow aforesaid and then to give their "'verdict aforesaid openly before the aforesaid justices at North"'ampton.' So that going back to the time of Queen Elizabeth "there had already existed some relaxation which is shown by "the custom mentioned in Plowden and extended gradually "until we get to the date of Blackstone's Commentaries."

Later Lord Reading said[5]: "The conclusion to which I "have come upon this point is that in civil trials the separation "of the jury does not invalidate the verdict. I think that it is "a practice which should be resorted to only in rare instances "and where special circumstances demand it. The danger of "allowing the separation is pointed out by Blackstone. It is a "danger which none the less exists in the present day. There "are, of course, circumstances which make it necessary or "desirable that the jury should return on the next day for the "purpose of hearing a further direction from the judge, or "perhaps of settling some point of controversy between the jury "as to the evidence, or perhaps for some explanation of the "summing-up of the learned judge which some of the jury may "not properly have appreciated. The practice in modern times "has been, within the knowledge of all who practise in these "courts, to allow a verdict to stand which is given after the "consideration of the jury in such a case as the present. It "does not happen often, and no doubt for the reason which I "have pointed out it is thought undesirable by the judges that "it should happen; nevertheless it may happen, and when it "does, unless there is something more in the case and in the "circumstances of the finding of the verdict than the mere fact "of the separation of the jury, the verdict will not be "invalidated."

Warrington L.J. said[6]: "I am of the same opinion, and I "only wish to add a very few words. The defendant contends "that in a civil action the mere fact that the jury are allowed "to separate avoids the verdict, that is, if they are allowed to "separate after they have received the learned judge's charge "and been asked to consider their verdict. Now I think the

---

[5] [1916] 2 K.B. 538, 547.

[6] Ibid. 549.

"authorities which have been referred to as to the power of a "jury to give a privy verdict are conclusive that that question "must be answered against the contention of the defendant. "Those authorities seem to me to establish this: first, that on "giving such a verdict as that the jury in recent times have been "allowed to separate; secondly, that such a verdict was not "final, but that when the jurors give their formal verdict they "may, at any rate where they have had a further consultation "since their separation, either alter or reverse the privy verdict. "If that is so, I think it follows necessarily that they may give "that which alone is their final verdict after they have "separated. In my opinion, therefore, the bare question which "is asked here, namely, whether in a civil action after the jury "have been charged they can be allowed to separate without "avoiding their verdict, must be answered in the affirmative."

The judgment of Warrington L.J. points strongly in favour of the plaintiff's contention in the present case, but it is to be observed that he was not considering the question before this court; he, indeed, referred to that which was asked in that case as "the bare question which is asked here."

Scrutton J., sitting as an additional member of the court, said[7]: "Secondly, I think that in civil actions the practice of "juries separating should be resorted to as seldom as possible "for the reason given by Blackstone: 'It is a dangerous practice, "'allowing time for the parties to tamper with the jury, and "'therefore very seldom indulged.' I cannot help noting, "speaking for myself, that in this case and in the last case "before the court considerable difficulty, if not the whole "difficulty, has arisen from the fact that the learned judge who "tried the case has not stayed while the jury were deliberating, "so that when they have found themselves in difficulty they "have not had the judge to advise them. I think myself it is "the duty of the judge to stay to assist the jury so long as the "jury are deliberating on their verdict, and the fact that in two "cases here we have had appeals which I think would have been "prevented if the judge had stayed supports my own personal "feeling on the duty of the judge in these matters."

In the same year *Banbury* v. *Bank of Montreal*[8] was before the Court of Appeal. There had been two hearings. On the first hearing before Lord Reading C.J. the jury had failed to reach agreement. On the second, before Darling J., the jury had answered questions, and they had added a rider on their answers to the questions; and the judge had later given judgment for the plaintiff. The appeal of the defendants was allowed on grounds which it is unnecessary to state, and judgment was entered for the defendants. Scrutton L.J. said [9]: "The jury added a rider "that the plaintiff should return all securities. The judge was "not there when the verdict was given, a practice which is most "unsatisfactory and has already once been commented on "unfavourably in this court; and therefore no attempt was made "to find out whether the jury meant that the securities were "really valueless after the bank's claim was exhausted, or had "not troubled to value them in view of their rider that the bank "should have them. On this part of the case a new trial must "have been ordered had not we ordered judgment to be entered "for the defendants."

---

[7] [1916] 2 K.B. 549–50.

[8] [1917] 1 K.B. 409; 33 T.L.R. 104.

I should imagine that the hearing before Darling J. and a jury had taken place before the judgment of the Court of Appeal in *Fanshaw's* case.[10] Scrutton L.J. was sitting in the Court of Appeal in both cases, and if he had regarded the verdict of the jury in *Banbury* v. *Bank of Montreal* [11] as a nullity he would surely have said so. The judge was not there when the verdict was given, he said, and for the second time he condemned the practice as most unsatisfactory. The point which is now taken could have been raised as an additional ground of appeal by the bank.

I am unable to say when the practice to which Scrutton L.J. referred began, or how far it has extended, though I should not like to think that it is a general practice in any sense. It may well be that it commenced through difficulties on circuit when a judge had to move from one circuit town to another. He could not leave a jury in a criminal case, but perhaps he could in a civil case; or he may have been content to rely on the agreement of counsel.

Two cases were cited to us, one in London and the other on circuit. In 1835 *Doe* d. *Lewis* v. *Baster* [12] was tried before Lord Denman C.J., and the report shows that [13] "The jury retired to "deliberate, and were absent for upwards of three hours, in the "course of which time his lordship and the counsel on both sides

---

[9] [1917] 1 K.B. 409, 442.
[10] [1916] 2 K.B. 538.
[11] [1917] 1 K.B. 409.
[12] (1836) 6 Nev. & M. 541.
[13] Ibid. 542.

"left the court, it having been previously agreed that the "associate should be left to receive the verdict. The jury, upon "their return, handed in a written verdict, by which they found "'that the machinery was the same, but that the annoyance "'had been increased during the application of the horse "'power.'" In the following term counsel obtained a rule nisi to set aside the verdict and to have a new trial, and that was argued. I only cite the case to show that which was done by the agreement of counsel. Williams J. in his judgment said [14]: "It is quite clear, that by the mutual consent of the parties, "the officer of the court was substituted for the judge, for the "purpose of taking the verdict."

The other case, in 1845, before Cresswell J. at Liverpool, was *Bentley* v. *Fleming*,[15] and the sidenote reads: "Upon the trial "of a cause, in which three issues were raised, each going to "the whole cause of action, it was agreed on both sides that "the verdict should be taken by the associate in the absence of "the judge, who, before he retired from the court, directed the "associate to take the verdict upon each of the issues separately. "Upon the return of the jury, the associate asked them whether "they found for the plaintiff or the defendant; and the fore-"man answered 'for the plaintiff.' The defendant's counsel "requested the associate to put the questions left to the jury "by the judge, to which the plaintiff's counsel objected; where-"upon the associate refused to put the questions, and ulti-"mately a general verdict was entered for the plaintiff: *Held*, "that the neglect to take the verdict upon each of the issues, "was a miscarriage on the part of the officer of the court in "taking the verdict; and the court, therefore, made a rule "absolute for a new trial, without costs on either side."

It was not suggested in either of those cases that the verdict was a nullity. If it was so by reason of its not being given in the presence of the judge, the court must have said so, for it would seem that agreement of counsel cannot turn a nullity into a reality.

It might well lead to most unfortunate results for litigants and for jurors if a verdict returned in the absence of the judge must be held to be a nullity. Notwithstanding that which was said in Coke upon Littleton and in Blackstone's Commentaries, it seems that for general convenience there has existed for a

[14] 6 Nev. & M. 545.

[15] (1845) 3 Dow. & L. 23.

long time a practice in which an officer of the court has taken the verdict of a jury in the absence of the judge.

The proper practice is that stated in Halsbury's Laws of England (2nd ed., vol. 19, pp. 316–317): "658. The verdict "of a jury of issue must be given in open court, in the presence "of them all, and in cases of treason and felony in the presence "of the defendant. It must be unanimous, except that in civil "causes the verdict of a majority may be taken by consent. It "is forthwith entered on the record by the officer of the court, "and the sealing and signing required of juries of presentment "are dispensed with. The jury are then discharged.

"659. A jury once discharged after giving a verdict upon "which judgment has been entered cannot be recalled to rectify "the same, but there must be a new trial if the court considers "that injustice has been done."

In *Ellis* v. *Deheer*, Atkin L.J. said[16]: "This was a trial "by jury, and in order to determine the issues in the action it "was necessary that there should be a unanimous verdict of "all the twelve jurymen. In accordance with the ordinary "practice the verdict is, or ought to be, delivered in open court "by the foreman in the presence of the other jurymen, and if "it is so delivered in their presence, and none of them protest, "there is a prima facie presumption that they all assented to it."

"Open court" means when a judge is sitting. The Annual Practice, 1952 (p. 2002) under the note "The Court or a Judge" contains this passage: "The words 'the court' mean the court "sitting in banco—that is, a judge or judges in open court; they "do not include a judge at chambers . . ."

We are, of course, dealing only with a verdict given in a civil cause, a suit between parties. Scrutton L.J. years ago drew attention to the undesirability of departing from the regular practice. The mere fact that the parties have to come back on another occasion adds to the cost of litigation to some extent, and there are other considerations: (1) the jury might wish further guidance from the judge, or they might desire to be reminded of some part of the evidence; (2) the question might arise as to how long they should be kept together in the hope of their arriving at an agreement, or as to the taking of a majority verdict; (3) answers given by a jury may give rise to a difficulty which cannot be cleared up if they have been discharged.

---

[16] [1922] 2 K.B. 113, 120; 38 T.L.R. 605.

Mr. Elwes, for the defendants, while accepting that which Scrutton L.J. said, added that if a judge left before the jury returned a verdict, he did so at his risk. I feel that the risk is rather that of the parties. The parties, and the jury, are entitled to expect that the judge will remain if they have to do so; that is, in the absence of unforeseen circumstances. I am not prepared to hold that the mere fact that a verdict in a civil case is returned, or is taken, when the judge is not present renders it a nullity. There must have been a number of cases in which a verdict has of necessity been taken in those circumstances, and there is no decision of the courts which supports the plaintiff's contention. This court ought not to hold that the verdict is a nullity in the absence of any other ground. If we did so it would add to the difficulties of both litigants and jurors. In my opinion, this point fails.

[His Lordship then considered the furthur grounds of appeal, which are not relevant to this report, and concluded:] In my opinion, the appeal must be dismissed.

BIRKETT L.J. I am of the same opinion. The first point taken by the plaintiff is unusual in that, as I understand it, it has never been raised in a court before. [His Lordship stated the substance of the pleadings in the action, and continued:]

The facts are really not disputed, and in my opinion there was no injustice done by the procedure which was followed. That, of course, does not end the matter, but it is an ingredient for consideration. Mr. Halpern on the Monday morning made the suggestion to the judge that the jury might have changed their minds between the Friday night and the Monday morning after further consultation and might have returned a different verdict in court; but I am bound to say that I share the view of the judge that that was a little fanciful, and the judge so regarded it. [His lordship then reviewed the facts, and continued:]

The same point presented by Mr. Halpern to Finnemore J. on the Monday was presented by Mr. Lloyd-Jones in this court, though more fully and under various aspects, the essential point being that in the absence of the judge, when the jury returned their verdict, and the associate received it, the proceedings became a nullity so far as the verdict was concerned. Mr. Lloyd-Jones said that there was no verdict in law at all. This, he said further, was a privy verdict, and a privy verdict was a nullity unless it was somehow turned into a public verdict, and that could only be done by the jury publicly returning their verdict to the judge. The verdict, he said further, to be a valid verdict must be a verdict returned in open court, and unless the judge was present it was not an open court, and, indeed, it was no court at all. To constitute a court in the true sense of the term the presence of the judge was essential. He further said that the judge had no power to delegate his duties, and made two quotations from Bacon's Abridgment in support of that submission.

No authority was produced which was directly in point; that was scarcely to be expected if in fact this was the first time that this precise point had been raised in this way. In all the learning gathered in the many volumes of State Trials, where almost every conceivable point relating to juries has been determined and discussed, there is no mention of this point. But *Fanshaw* v. *Knowles* [17] was cited in support of the submission, although it was recognized that the question at issue in that case was quite different from the issue in the present appeal, that when the associate received the verdict in the circumstances in which he did, it was in truth a privy verdict, and that there were no means of ever turning that privy verdict into a public verdict, and the whole thing was a nullity.

I do not propose to quote from the judgment in that case, but I am of opinion that the term "privy verdict" cannot properly be applied to the verdict returned in the circumstances of the present case. A privy verdict was a verdict given for the purpose of alleviating the hardship suffered by jurymen in olden days. In the office of the Clerk of the Peace of 1682 the words of the oath given to the party sworn to take charge of a jury on its retirement were: "You shall well and truly keep "every person sworn of this jury in some private and convenient "room without light, drink, fire, candle or lodging"; and Macaulay, in most memorable language, has dealt with the situation as it existed at the famous trial of the seven bishops in 1688; and in 1854, when the Common Law Procedure Act was being discussed in the House of Lords, Lord Campbell himself relates the attempts which he there made to overcome what he termed the barbarous custom of imprisoning and starving juries to compel unanimity. Indeed, as we know from the citations in this case, it was not until 1870 that the Act was passed which permitted a jury to have a fire. In olden days when a jury had agreed on their verdict, and they then communicated their verdict privately to the judge, or, indeed, to any judge, those hardships could be alleviated; but the private verdict which had been delivered for the purpose of alleviating their hardships was no verdict at all unless that private verdict was in some way turned into a public verdict, and, according to the learning recorded in *Fanshaw's* case,[17] that could only be done by the jury returning their verdict in open court before the judge.

---

[17] [1916] 2 K.B. 538.

I do not think that that learning and that decision have any bearing on the circumstances of this case. We have not been told the circumstances in which Finnemore J. left the court on the Friday, or the instructions which he left to the associate. But from what Finnemore J. said on the Monday morning, a fairly clear inference can be drawn that his instruction was to receive the verdict if it was a plain verdict, but that if any complication of any kind arose the jury were to be asked to return.

The associate, when the jury returned into court, received the verdict and recorded it for the judge to see on the Monday morning, and it could not be said that there was anything private or privy except in a highly technical sense. It was a thing publicly done and publicly recorded in the presence of all the jurymen, no doubt of counsel, and of such members of the public as had remained in court interested in the result. There was no secrecy, or anything of the kind which the administration of justice has always been strong to avoid, and, in my view, this could not properly, in the circumstances of the case, be termed a privy verdict.

The question would, therefore, seem to be this: is it essential to the validity of the verdict of a jury in a civil case that the judge himself shall be in court to receive it at the time the jury returns, and the associate, as the officer of the court, receives the verdict?

I agree fully with what Scrutton J. said in 1916 in *Fanshaw* v. *Knowles*,[17] and what, as Scrutton L.J., he affirmed in 1917 in *Banbury* v. *Bank of Montreal*.[18] In *Fanshaw* v. *Knowles* [19] he said: "I think myself it is the duty of the judge "to stay to assist the jury so long as the jury are deliberating "on their verdict, and the fact that in two cases here we have "had appeals which I think would have been prevented if the "judge had stayed supports my own personal feeling on the duty "of the judge in these matters." In *Banbury* v. *Bank of Montreal* [20] he said: "The judge was not there when the verdict

---

[17] [1916] 2 K.B. 538.

[18] [1917] 1 K.B. 409, 442.

[19] [1916] 2 K.B. 538, 549–50.

[20] [1917] 1 K.B. 409, 442.

"was given, a practice which is most unsatisfactory and has "already once been commented on unfavourably in this court."

I cite those passages again because I want to record my own view, which is strongly to indorse what was then said about the desirability of the judge being present in court while the jury are deliberating. A jury may want further assistance during their deliberations; their verdict, when delivered, may be ambiguous and require explanation; it may be a verdict which the judge cannot accept; the jury may agree on some questions and disagree on others; the parties may be asked to consider whether they will take a majority verdict; and it is plain that in circumstances such as these nothing can be done until the judge is present. It is therefore, in my view, most desirable that he should be present while the jury are deliberating.

The question really for this court is this: is it essential when none of the things which I have enumerated has occurred? Finnemore J. on the Monday morning said that if there had been any trouble of that kind the jury would have had to come back, and he also said on the same day that "if they had given a "proper, plain, straightforward verdict, as in this case, with no "qualifications and no point calling for legal argument, or any"thing of that kind, the verdict has been accepted as the verdict "of the jury, and in due course, normally the next day, formal "judgment has been asked for and has been entered." Finnemore J. was stating from his experience that this situation was not uncommon, not unknown; and, of course, one must continually keep in mind that in many cases, no doubt, where this procedure has been followed, no question at all has been raised. It is only in those cases where trouble has occurred about the verdict that in the ordinary course of things those matters come into courts. But a submission was made—and I think that it is the most difficult point in the case—that the verdict must be returned in open court, and that, in the absence of the judge, there was not merely no open court; there was in truth no court at all; and the passage was read from the Annual Practice with the authorities there cited in support of the view that a court means the judge sitting in open court. The use of the term "open court" is customarily designed to emphasize the publicity of English judicial proceedings. These things must be done in open court; they must be done publicly; they must be done for all men to see. The passage which has been cited, and the authorities which support it, seem to show that "open "court" means the court where the judge is sitting.

In this present case it is clear that the judge had instructed the associate to receive the verdict in his absence in the courtroom in the presence of the jury, and it is important to notice that everything in fact happened on the Friday afternoon exactly as it would have happened if the judge had been seated in his chair. The associate would have asked those questions, would have received those answers, and in obedience to the direction of the judge would have discharged the jury; and, presumably, he received the verdict and discharged the jury under the judge's direction just as though the judge had actually been sitting there giving the instructions at that moment. I do not think that there was here any delegation of the judge's duty in the sense in which Mr. Lloyd-Jones submitted that there had been delegation, because it would appear that the act which the associate did under the direction of the judge was the act which he would have done had the judge in fact been present in person; but I still think that it is a difficult point.

However, it is plain that the practice which was followed that afternoon was not unknown. Scrutton J. referred to two cases in 1916; in 1917 he referred to a further case, and it is, I think, highly important to notice that he never said: "All this "renders it a nullity." He said: "I express my personal view "that for the judge to be absent is unsatisfactory"—not that there is no court; not that everything which is done is of no validity; he confined it to that personal view.

In *Bentley* v. *Fleming*,[21] before Cresswell J., it was agreed between counsel on both sides that the associate should take the verdict. The judge left the court, having previously handed certain questions to the associate. On the argument on that verdict no one ever suggested that the whole proceedings were a nullity because the judge was not present. Tindal C.J., who delivered the judgment of the court, said that if the associate had followed the directions which he had received from the judge all would have been well.[22] The Chief Justice was saying that, if the associate had done what the judge had said, there would have been no trouble; and it is very difficult to imagine that Tindal C.J. had in mind that if the judge was not there the whole thing was a nullity. No one suggested it.

In 1835 in *Doe* d. *Lewis* v. *Baster*,[23] the same point was made. The jury retired to deliberate and were absent for upwards of three hours. Counsel and the judge left the court. In that case Lord Denman C.J. was the judge, and with the agreement of counsel he permitted the verdict to be returned in his absence. When the matter came up for argument, Lord Denman C.J., Littledale, Patteson and Williams JJ., all delivering judgments, never said one word to the effect that this thing was a nullity because the judge was not present in court; and, therefore, it seems plain to me that, for more than a hundred years at any rate, there have been occasions when the procedure followed by Finnemore J. on this Friday afternoon had been followed in courts; and I find it impossible to believe that the parties can by agreement add validity to that which is in its very nature invalid. If a judge is compelled to leave the court when the jury is deliberating—as he may well be for reasons which are easily formulated—and in his absence the jury returns with a simple verdict which the associate has been instructed to receive, and if complications arise the jury are to be asked to return, I cannot think that, in those circumstances, in the light of past experience and in the light of what would appear to have been the practice to be followed in cases of emergency, the absence of the judge makes the verdict of the jury invalid, and I am, therefore, of opinion that the first point fails.

---

[21] 3 Dow. & L. 23.

[22] Ibid. 25.

[23] 6 Nev. & M. 541.

[His Lordship then considered the further points of appeal, and concluded:] On the whole case I agree that this appeal ought to be dismissed.

HODSON L.J. The plaintiff contends that the judge was wrong in entering judgment for the defendants because the verdict was given by the jury to the associate in the absence of the judge; and in making that submission the plaintiff relies, in the first place, on the passages in Coke on Littleton and in Blackstone's Commentaries which have already been read from the judgment of Lord Reading C.J. in *Fanshaw* v. *Knowles*.[24] Those passages had to do with the difference between a privy verdict and a public verdict, a public verdict being one which must be given in open court, whereas a privy verdict could previously be given to any of the judges available in order to release the jury from their confinement in civil cases.

At the conclusion of his argument Mr. Lloyd-Jones, for the plaintiff, recognized that he could not fairly compare the verdict given (as in this case) to the associate to a privy verdict which has long since ceased to be a matter of practical importance; but he did rely, and, indeed, was entitled to rely, on the language of Coke and Blackstone, where emphasis was laid on the words "in "open court," and he said that "open court" necessarily involves the presence of the judge; that one cannot conceive those words being used of a court-room in which, indeed, the officer of the court was sitting, but there was no judge; and it would follow from that that any verdict so given must be a nullity.

---

[24] [1916] 2 K.B. 538.

I agree that that argument is a formidable one. If one takes the words "in open court" at their accepted value, the verdict in this case was not given in open court; but the matter does not rest there. One has to remember that these things developed on historical lines, as, indeed, the relief of juries developed on historical lines, and since the eighteenth century the practice of the courts, as the authorities show, has been to regard the giving of the verdict to the associate in the absence of the judge as a recognizable practice.

I agree whole-heartedly with what has fallen from my Lords with regard to the undesirability of the practice of allowing the verdict to be taken in the absence of the judge, a practice which was, although disapproved of by Scrutton J., later Scrutton L.J., in the two cases which have been mentioned, recognized by him as an existing practice.

The two cases in the last century which have been referred to, in which by consent the verdict of a jury was taken by an officer of the court, and in the absence of the judge, show that in the eyes of the court those verdicts could not be regarded as mere nullities, because, if they were nullities, consent could not cure their invalidity.

The researches of counsel drew our attention to another case, *Baker* v. *Oakes*,[25] in the Court of Appeal, where the subject-matter of the appeal was a question of costs which has no relevance; but the judge of appeal, Sir Richard Amphlett, did recognize the existence of this practice in supposing a case in which a judge had left the court, or, perhaps, the circuit town, before a verdict was returned, and he supposed also that an officer had been delegated by the judge to take the verdict. That was in 1877.

Passing by the two cases in the Court of Appeal to which I have already referred, I come to *Ellis* v. *Deheer*,[26] in which

---

[25] (1877) 2 Q.B.D. 171.

[26] [1922] 2 K.B. 113, 120.

C. A.
1953

HAWKSLEY
v.
FEWTRELL.

Hodson L.J.

Atkin L.J. referred to this matter and said: "In accordance "with the ordinary practice the verdict is, or ought to be, "delivered in open court . . ." That, again, I think, was the language of a Lord Justice who recognized that there had been cases where, in the strict sense of the word, the verdict had not been delivered in open court, and I think that the development of the law, as shown by the decided cases, compels this court to say that the rigidity of the rule has been relaxed to this extent, namely, that the associate may, if the circumstances warrant it, receive the verdict of the jury, although, of course, no judicial act can be taken on that verdict; yet the verdict may be received by the officer of the court in the absence of the judge. I agree, therefore, that the appeal fails on this ground, and also on the separate ground of misdirection.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *T. D. Jones & Co.; T. MacDonald Baker.*

M. M. H.

HOUGHTON *v.* TRAFALGAR INSURANCE CO. LD.

[1951 H. 2772.]

C. A.
1953
Nov. 11.

Somervell, Denning and Romer L.JJ.

Insurance — Motor-car — Exclusion clause — Insurers not liable if car "conveying any load in excess of that for which it was constructed" —Number of passengers in excess of seating accommodation—Whether clause applicable—Contract—Construction—Contra proferentem rule.

A policy of insurance covering a motor-car contained a provision excluding liability for damage "caused or arising whilst the car "is conveying any load in excess of that for which it was con-"structed." At the time of an accident six persons were being conveyed in the car, although seating accommodation was only provided for five persons, and the insurers denied liability on the ground that a load in excess of that for which the car was constructed was being carried:—

Held, affirming the decision of the trial judge, that the words "any load in excess of that for which it was constructed" only covered cases where there was a specified weight which must not be exceeded, as in the case of lorries or vans.

Decision of Gorman J. affirmed.

C. A.

1953

HOUGHTON
v.
TRAFALGAR
INSURANCE
CO. LD.

APPEAL from Gorman J.

The plaintiff, Mr. Houghton, insured his motor-car with the defendants, Trafalgar Insurance Co. Ld., under a policy called "Invincible," which contained a clause exempting the company from liability for damage caused or arising whilst the car was "conveying any load in excess of that for which it was constructed." On March 18, 1951, the plaintiff was involved in an accident which resulted in the car becoming a total loss. At the time there were six persons in the vehicle—the plaintiff (driver) and one passenger in the two front seats, and three passengers in the three back seats, and one passenger sitting on the knees of one of them. In those circumstances the defendant company denied liability for the damage to the car, on the ground that the load which the vehicle was conveying was in excess of that for which it was constructed.

Gorman J. decided against the company's contention and gave judgment for the plaintiff.

The defendants appealed.

C. N. Shawcross Q.C. and *Humfrey Edmunds* for the defendants. The only probable cause of the accident which resulted in the car becoming a total loss was the overloading due to the carrying of more passengers than it was constructed to carry. The policy covered only five persons, and any number in excess of that was excluded. In the case of a motor-car, which is constructed to carry passengers, the load means numbers and not weight. The judge below appeared to think that the "exclusion" clause (d) referred to weight. It is submitted that it does not refer to weight except as applied to certain lorries. On the finding of the judge even more passengers could have been carried and still this car would not have been overloaded.

Patrick O'Connor, for the plaintiff, was not called upon for argument.

SOMERVELL L.J. stated the facts and continued:—It is said that in those circumstances there is no liability under the policy, and that the car was not covered because of a provision in a group of clauses which are headed "Exclusions." The first part of the clause which contains the provision relied on reads, "(d) Loss, damage and/or liability caused or arising whilst any "such car is engaged in racing, pace-making, in any reliability "trials, speed testing, or is conveying any load in excess of that "for which it was constructed." It is argued that the load here was in excess of that for which the car was constructed, in that one passenger was seated on the knees of another and the seating accommodation was all occupied. The judge decided against that contention, adversely to the defendants, who now appeal.

If there is any ambiguity, since it is the defendants' clause, the ambiguity will be resolved in favour of the assured. In my opinion, the words relied on, " any load in excess of that for " which it was constructed," only clearly cover cases where there is a weight load specified in respect of the motor-vehicle, be it lorry or van. I agree that the earlier words in the clause obviously are applicable to an ordinary private car in respect of which there is no such specified weight load. But there was—and I think that it would have been inadmissible—no evidence whether this was a form which was used for lorries as well as for ordinary private motor-cars. I do not think that that matters. We have to construe the words in their ordinary meaning, and I think that those words only clearly cover the case which I have put. If that is right, they cannot avail the insurance company in the present case.

I would only add that the present suggestion of their application is, to me, a remarkable one. I think that it would need the plainest possible words if it were desired to exclude the insurance cover by reason of the fact that there was at the back one passenger more than the seating accommodation. All sorts of obscurities and difficulties might arise. I would like to add that if this or any other insurance company wishes to put forward a policy which will be inapplicable when an extra passenger is carried, I hope that they will print their provision in red ink so that the assured will have it drawn to his particular attention. For these reasons, in my opinion, this appeal should be dismissed.

DENNING L.J. It would surprise most motor-car owners to be told that if they squeezed in an extra passenger, one more than the ordinary seating capacity, thereby they lost the benefit of the insurance policy. But that is what the insurance company are contending here. They say that by reason of this exclusion clause they are under no liability. If the clause had such an interpretation I would regard it almost as a trap. I am glad to find that the clause does not bear that extended interpretation. It is only applicable to cases where there is a specified weight which must not be exceeded, as in the case of lorries. I agree that the appeal should be dismissed.

C. A.
1953

Houghton
v.
Trafalgar
Insurance
Co. Ld.

Romer L.J. I also agree. I think that it would be most regrettable if a provision of this kind were held to have the force for which the defendants contend. It would be a serious thing for a motorist involved in a collision if he were told that the particular circumstances of the accident excluded him from the benefit of the policy. I think that any clause or provision that purports to have that effect ought to be clear and unambiguous so that the motorist knows exactly where he stands. This provision is neither clear nor unambiguous. If applied to a private motor-car I have not the least idea what it means. Accordingly, for that reason, and the reasons which my Lords have given, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *R. I. Lewis & Co.; Hewitt, Woollacott & Chown.*

A. W. G.

1953
Mar. 9, 30.

Lynskey J.

C. A.

Oct. 28, 29, 30; *Nov.* 2, 3, 4, 24.

Somervell, Denning and Romer L.JJ.

DRIVE YOURSELF HIRE CO. (LONDON) LD. *v.* STRUTT AND ANOTHER.

[1952 D. No. 332.]

Landlord and Tenant—Rent restriction—Claim for possession—Lease—Covenant not to assign without consent—Sublease with consent of landlord—Assignment of sublease with consent of superior landlord to a company for the use and occupation of a named person—Assignment to that person with consent only of sublessor—Whether assignee a lawful subtenant entitled to protection of Rent Acts—Restrictive covenant—Contract—Benefit to third party—Third party's right to sue—Covenant respecting property—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12 (1) (*f*) (*g*), 15 (3)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1) *and Sch. I, paras.* (*a*) *and* (*d*).

A lease for a term of 20 years from November 11, 1931, contained a covenant not to assign, underlet or part with possession of the premises without the consent of the landlord. In April, 1932, the landlord granted a licence to the first defendant, the tenant under the lease, for the creation of a sublease to expire on November 10, 1951, one day before the expiry of the headlease. The licence provided that the sublease should contain a covenant that the sublessee

---

[Reported before Lynskey J. by Mrs. E. M. Wellwood, Barrister-at-Law.]

should not assign without the consent of the superior landlord. The sublease, containing the covenant, was duly executed. The superior landlord was not a party to the sublease and the power of re-entry and determination of the sublease for breach of covenant was reserved to the first defendant alone. In January, 1937, with the consent of the first defendant and the superior landlord, the sublessee assigned the remainder of the term of the sublease to a company. In February, 1951, the first defendant permitted the company to assign the balance of the sublease to the second defendant. The consent of the superior landlord to the assignment was not asked for or obtained. The second defendant continued in occupation of the premises after the expiry of the sublease and of the headlease.

The plaintiffs, the successors in title of the original superior landlord, brought proceedings for possession against both defendants, who relied on section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920:—

Held, by Lynskey J., that the second defendant became the tenant under section 15 (3) and was entitled to the protection of the Act.

On appeal by the plaintiffs:—

Held, that the definition of subtenant in section 15 (3) should be construed as covering an assignee of a subtenant; that the second defendant was therefore a subtenant, but in order to claim the protection of section 15 (3) he must establish that all the steps which led up to the assignment to him were lawful; and that there having been a breach, either by the first defendant or by the company, of the covenant, inserted for the protection of the superior landlord in the sublease, not to sublet without the consent of the superior landlord being first obtained, the assignment to the second defendant was not lawful; and that the plaintiffs were entitled to possession.

Per Denning L.J. It was an implied term of the contract between the superior landlord and the first defendant that she should not release the subtenants from the obligation to obtain the consent of the superior landlord to any assignment. If she did release the company from that obligation she was herself acting unlawfully. If there was no such term to be implied the action of the company in breach of the covenant in their sublease was unlawful. They deliberately broke a covenant which was inserted for the benefit of the superior landlord. Such a breach was unlawful, although the superior landlord was not a party to the instrument. The case seems to me to fall precisely within the words of section 56 of the Law of Property Act, 1925, which says that "A "person may take . . . the benefit of any . . . covenant . . . respect-"ing land or other property, although he may not be named as a "party to the . . . instrument," and did away with the rule in *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393 in cases respecting property.

Decision of Lynskey J. [1953] 2 W.L.R. 953; [1953] 1 All E.R. 1036 reversed.

ACTION for possession.

The plaintiffs' predecessor in title, one A. S. R. Payne, leased a first-floor flat, No. 1, Chester Close, London, S.W.1, to the first defendant, Miss Emily Strutt, for a term of 20 years from November 11, 1931, at a rental of £150 per annum. The lease contained a covenant by which the first defendant undertook not to assign, underlet or part with possession of the premises without the consent of the landlord, such consent not to be unreasonably withheld. The lease also contained a power of re-entry on any breach of covenant. On April 20, 1932, the first defendant granted a sublease of the premises to a Mrs. Dorothy Sykes for a term of 10 years, which was later extended so as to make the term of the sublease expire on November 10, 1951, the day before the expiry of the headlease. The rental payable under the sublease was £200 per annum. The superior landlord gave his consent to the creation of that sublease in a licence which provided that the sublease should contain a covenant by the sublessee not to assign, underlet or part with possession of the premises without the consent of the superior landlord; that the licence was to be restricted to the sublease then created; and that the covenant in the headlease against assignment or underlettings should remain in full force and effect. The sublease duly contained the covenant against assignment as directed by the licence. The superior landlord was not a party to the sublease and the power of re-entry and determination for breach of covenant was reserved only to the first defendant.

On January 26, 1937, Mrs. Sykes assigned the sublease to Wroxall Estates Ld., a company which had been formed to manage the estates of the second defendant, Commander James George Grenville Dugdale, who was the managing director of the company. The superior landlord consented to that assignment by a licence which provided specifically for the use and occupation of the premises by the second defendant. In 1950, when it was proposed to wind up the company, solicitors for the second defendant informed the first defendant that Wroxall Estates Ld. wished to assign the sublease to the second defendant and inquired whether it was necessary under the terms of her lease to obtain the permission of the superior landlords—then the Drive Yourself Hire Company (London) Ld., the plaintiffs. The first defendant considered that the superior landlords' consent was not necessary and this was confirmed by her solicitors in a letter dated January 1, 1951. On February 28, 1951, the first defendant granted a licence to the company consenting to their assignment to the second defendant of the unexpired residue of the term of the sublease and the assignment was duly executed on May 21, 1951. The second defendant remained in occupation of the premises after the expiry of the sublease on November 10, 1951, and after the expiry of the headlease on November 11, 1951.

The plaintiffs brought proceedings against both defendants alleging that the first defendant had failed to deliver up possession on the expiry of the term of her lease and that the premises were wrongfully occupied by the second defendant. The first defendant, in her defence, contended that having, with the licence in writing of the plaintiffs' predecessor in title, created a sublease which was lawfully assigned to Wroxall Estates Ld. and thereafter lawfully assigned by that company to the second defendant, who resided in the premises, the second defendant was entitled to the protection of the Rent and Mortgage Interest (Restrictions) Acts, 1920–39; that upon the expiry of the subterm on November 10, 1951, he had retained possession of the premises as statutory tenant for one day against the first defendant as his immediate landlord, and after the expiry of the first defendant's term against the plaintiffs as reversioners; that he still retained possession of the premises and that she was thereby prevented by the operation of the Rent Acts from delivering up possession of the premises to the plaintiffs. The second defendant, in his defence, relied on the facts set out above and claimed the protection of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.[1]

By their reply the plaintiffs alleged that the assignment by Wroxall Estates Ld. to the second defendant was unlawful as it had been made without their consent as superior landlords and in breach of an express or implied agreement contained in, or to be inferred from, the licence to sublet by the first defendant, not to consent to the assignment of the sublease without enforcing the covenant in the sublease which required the sublessee to obtain the plaintiffs' consent to any assignment of that sublease.

---

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3): "Where the interest of a tenant "of a dwelling-house to which this "Act applies is determined, either as "the result of an order or judgment "for possession or ejectment, or for "any other reason, any subtenant to "whom the premises or any part "thereof have been lawfully sublet "shall, subject to the provisions of "this Act, be deemed to become the "tenant of the landlord on the same "terms as he would have held from "the tenant if the tenancy had "continued."

The plaintiffs further contended that if the Rent Acts applied they were entitled to possession under section 3 (1) and paras. (*a*) and (*d*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

L. J. Belcourt for the plaintiffs.
D. J. Hyamson for the first defendant.
Montague Waters for the second defendant.

Cur. adv. vult.

March 30. LYNSKEY J. The plaintiffs' title to the reversion of the lease, as successors in title to Arthur Samuel Roberts Payne, was admitted by both defendants. The questions, therefore, which I have to consider are: (1) Was the second defendant in lawful occupation of the premises on November 11, 1951? (2) If so, was he a tenant to whom the premises had been lawfully sublet?

If the answers to both these questions were in the affirmative, with the result that the Rent Acts would apply to the occupancy of the second defendant, further questions would arise, namely: (3) Had there been a breach or non-performance of the obligations of the lease or the sublease? (4) Had the premises been let without the consent of the landlord? (5) Would it be reasonable to make an order for possession in all the circumstances?

[His Lordship stated the facts and continued:] The first question which I have to consider is whether the second defendant was in lawful possession of the premises on November 10, 1951. That he was in lawful occupation of the premises seems clear. The terms of the licence to assign, dated January 26, 1937, signed by both Miss Strutt and Mr. Payne, consent to the assignment of the sublease to Wroxall Estates Ld. "for the use and occupation of the second defendant." But was he in such occupation lawfully as a subtenant? This must depend primarily on whether the assignment to him was a valid assignment, being made as it was without the consent of the plaintiffs, although with the consent of the first defendant.

The original lease of October 27, 1931, by Mr. Payne to Miss Strutt contained a covenant on the part of Miss Strutt not to underlet without consent. The licence of Mr. Payne to Miss Strutt to create the underlease to Mrs. Dorothy Sykes was a conditional one. The condition was that such underlease was to contain a covenant by the underlessee not to assign, let or part with the possession of the premises without the warrant of the superior landlord or those claiming under him. The sublease to Mrs. Sykes in fact contained the covenant not to assign, underlet or part with the possession of the premises without the written consent of the landlady, Miss Strutt, and the superior landlord. The sublease, therefore, was in compliance with the terms of the licence. It seems clear that Mr. Payne, as the superior landlord, desired and intended to retain control of any assignment of the sublease by the sublessor and to prevent such assignment without his consent, but by the terms of his licence and the covenant in the sublease did he succeed in doing so?

The subtenant is not a party to the superior lease and the superior landlord is not a party to the sublease. The sublessee's covenants are with the sublessor and can only be enforced by her: *Williamson* v. *Williamson*.[2] If the sublessor chooses not to enforce the covenant requiring the sublessee to obtain the superior landlord's consent, the superior landlord cannot enforce this covenant in the sublease. Consequently, if the superior landlord desires to exercise a control over future dealings by the sublessee, he can, in general, only do so by making his licence for the underlease expressly conditional on the insertion therein of a provision restricting the underlessee from assigning without the superior landlord's consent and by requiring his lessee, that is, underlessor, to bind himself or herself to enforce the covenant, or by making it a term of the licence that he, the superior lessor, is a party to her underlease containing such a covenant: see Foa's Landlord and Tenant, 7th ed., p. 257, note (*e*), and *Mackusick* v. *Carmichael*.[3]

In this case the superior landlord was not made a party to the sublease and did not expressly require the sublessor to bind herself to enforce the covenant by the sublessee. It was argued, on behalf of the plaintiffs, that I should imply such a term from the licence by Mr. Payne, on April 19, 1932, to Miss Strutt to create the sublease and the granting, by Miss Strutt, of the sublease under the licence. It was said that as Miss Strutt had granted the sublease on the terms of the licence, she impliedly agreed to enforce the covenant in the sublease that there should be no assignment without the superior landlord's consent. This does not seem to me to be a necessary implication and would of course impose serious obligations on Miss Strutt. It might compel her to re-enter for breach of covenant and to determine the sublease when the superior landlord refused his consent, although the proposed assignee was, in her view, a suitable and a proper person, and might compel her to lose the benefit she had obtained from the sublease at the increased rent. I am of opinion that I ought not to imply such a term. It is not necessary to give business efficacy to the licence and to the grant of the sublease. If Miss Strutt had agreed to such a term it might have been very unbusinesslike on her part so to do.

---

[2] (1874) L.R. 9 Ch. 729, 732, 736.
[3] [1917] 2 K.B. 581, 586.

The result is that, in my view, it was for Miss Strutt to enforce the covenant in the sublease not to assign without the consent of the superior landlord, or not, as she thought fit. If she thought fit to consent to such an assignment of the sublease, without the consent of the superior landlord, such an assignment would appear to have been quite valid and lawful. While it is clear that Miss Strutt consented to the assignment of the lease from Wroxall Estates Ld. to the second defendant, I have to consider whether she did so without requiring Wroxall Estates Ld. to obtain the consent of the plaintiffs.

The letter written to her by the second defendant's solicitors on November 30, 1950, in terms only inquired if it was necessary, under the terms of the headlease, for Miss Strutt to obtain the permission of the superior landlord to her consent to an assignment of the underlease. Miss Strutt's reply of December 4, 1950, answers this question in the negative. Miss Strutt's solicitors' letter of January 1, 1951, on the other hand, states: "There "appears to be no necessity to obtain the permission of our "client's superior landlords to grant your clients, Wroxall Estates "Ld., a licence to assign to Mr. Dugdale." This was a statement, general in terms, that no permission from the superior landlords was necessary. At this time Miss Strutt's solicitors, Farrer & Co., were in correspondence with the superior landlords, or their representatives, upon the question of outside repairs and, judging from their letter of February 27 to the plaintiffs, Farrer & Co. had the terms of the sublease before them. Farrer & Co.'s letter of March 27, 1951, to the second defendant's solicitors, Child & Child, makes this equally clear.

On behalf of the plaintiffs it was contended before me that all that Miss Strutt, or her representatives, were saying was that no consent was required from the superior landlords by the terms of the headlease and that she did not consent to the assignment of the sublease to the second defendant, on the terms that the sublessors need not obtain the consent of the superior landlords.

Miss Strutt did not give evidence before me and no evidence was called on her behalf. I have, therefore, to decide what is the proper inference to be drawn from the correspondence. If the only letter was that from Miss Strutt of December 4, 1950, I should have been left in some doubt, but, in view of the letter of her solicitors, Farrer & Co., of January 1, 1951, and of the fact that they had the terms of the sublease before them and that they drafted the licence to assign and agreed its terms in a formal way with the second defendant's solicitors, I am satisfied that Miss Strutt and her advisers were prepared to, and did consent to, the assignment of the sublease from Wroxall Estates Ld. to the second defendant, without requiring the company to obtain the consent of the plaintiffs to the assignment.

In the result, I am of opinion that the sublease was lawfully assigned by the Wroxall Estates Ld. to the second defendant; that thereafter the second defendant was lawfully in occupation as a subtenant of the premises.

That brings me to the second question, namely, whether the second defendant was a subtenant to whom the premises had been lawfully sublet, within the meaning of section 15 (3) of the Rent and Mortgage Interest (Restrictions) Act of 1920. The premises were originally lawfully sublet to Mrs. Dorothy Sykes, who assigned her interest to Wroxall Estates Ld., who in turn assigned, lawfully, as I have found, that interest to the second defendant. The premises were not actually sublet to the second defendant. By section 12 (1) (*g*) of the Rent Act, 1920, the expressions "tenant" and "tenancy" in the Act include subtenant and subtenancy and the expression "let" means sublet. By section 12 (1) (*f*) of the same Act the expression "tenant" includes any person deriving title under the original tenant. As a result of these two provisions, the word "subtenant" in section 15 (3) of the Act includes any person lawfully deriving title under the original subtenant and would, therefore, include the second defendant.

If this be right, I now have to consider whether section 15 (3) of the Rent Act of 1920 applies to the circumstances of this case. That section provides: "Where the interest of a tenant of a "dwelling-house to which this Act applies is determined, either as "the result of an order or judgment for possession or ejectment, "or for any other reason, any subtenant to whom the premises "or any part thereof have been lawfully sublet shall, subject to "the provisions of this Act, be deemed to become the tenant "of the landlord on the same terms as he would have held from "the tenant if the tenancy had continued." If that subsection had stood alone, it would not appear to apply to the facts of this case, as the second defendant's subtenancy expired on the day before the first defendant's tenancy expired.

In construing subsection (3) of section 15 of the Rent Act of 1920, one must have regard to the provisions of subsection (1) of the same section. Subsection (1) provides that a tenant (which by virtue of section 12 (1) (*g*) includes a subtenant) "who by "virtue of the provisions of this Act retains possession of any "dwelling-house to which this Act applies shall, so long as he "retains possession, observe and be entitled to the benefit of all "the terms and conditions of the original contract of tenancy, "so far as the same are consistent with the provisions of this "Act . . ." The effect of section 15 (1) operates, in my view, to continue the subtenancy of the second defendant as against the first defendant for November 11, 1951, and thereafter as against the superior landlords, the plaintiffs.

Reading these two subsections together, in my view the words determined "for any other reason" in section 15 (3) include determination by effluxion of time and, further, a subtenant who becomes a statutory tenant, under section 15 (1), is entitled to the benefit conferred upon subtenants by section 15 (3). The benefit conferred by section 15 (3) would, therefore, enure for the benefit of a subtenant retaining possession of a dwelling-house to which the Act applied so long as he retained possession. It is admitted that the premises are premises to which the Rent Acts apply and it is, of course, obvious that the subtenant is retaining possession of those premises. In my view, therefore, the second defendant must be deemed to have become the tenant of the plaintiffs on the same terms as those on which he would have held his subtenancy from Miss Strutt if her lease had not determined. and is entitled to the protection which the Rent Acts give to his occupancy.

Further questions now arise whether an order for possession should be made notwithstanding the fact that the occupancy of the second defendant is protected by the Rent Acts. Before determining these further questions it is necessary for me to decide whether, on the pleadings as they at present stand, it is open to the plaintiffs to ask for an order for possession if the Rent Acts apply. A preliminary objection was made by the second defendant that the plaintiffs, in their statement of claim, only claimed possession of the premises on the ground that the second defendant was in wrongful possession of the premises, and upon the basis that no claim, or other proceedings, would arise in the action out of the Rent Acts or any provisions thereof. The plaintiffs proceeded in this way in reliance on the decision of McCardie J. in *Gunter* v. *Davis*,[4] and notwithstanding the provisions of section 17 (1) and (2) of the Rent Restriction Act of 1920.

On April 7, 1952, the plaintiffs applied to remit this action to the county court, but this was resisted by the second defendant on the ground that the claim was not a claim within the terms of section 17, and the master refused to remit the action. On May 19, 1952, on the summons for directions, the master apparently took a different view and made an order remitting the action to the county court. Against that order the second defendant appealed to Donovan J. in chambers, who reversed the order of the master. On February 3, 1953, the plaintiffs applied for leave to amend their reply by including therein what, in effect, was a claim for an order for possession under the provisions of the Rent Acts if, contrary to the plaintiffs' contention, the Rent Acts applied to the occupancy of the second defendant. The second defendant resisted that application on the ground that the amendment sought would be a departure from the statement of claim as raising a new ground of claim in the reply, contrary to the provisions of Ord. 19, r. 16. The master allowed the amendment and, after the amendment was made, the second defendant applied to the master on February 17, 1953, to strike out the amendment as a departure, but the master refused that application. Thereupon the second defendant appealed to Parker J. in chambers against the master's refusal. That appeal was heard on February 25, 1953, the day before the case was in the list for hearing, and Parker J. made no order, leaving the question to be raised at the trial. The second defendant took the objection before me as a preliminary point.

The plaintiffs' contention was that there was no departure, as their claim for possession was under their common law right to possession and, even although the Rent Acts applied, the provisions of those Acts were simply restrictive of their common law rights and any order for possession, even under the provisions of the Rent Acts, was made by virtue of those common law rights. I cannot accept this contention. In my view the law was correctly stated by Scrutton L.J. in *Russoff* v. *Lipovitch*[5] as follows: "It is contended on behalf of the landlord that the

---

[4] [1925] 1 K.B. 124.

[5] [1925] 1 K.B. 628, 636.

1953

Drive Yourself Hire Co. (London) Ld. v. Strutt.

Lynskey J.

"claim to recover possession is a claim arising, not out of the "Rent Restrictions Act, but out of the common law. That "contention is, to my mind, not merely very technical, but also "inaccurate," and later he said: "It is not, in my opinion, "accurate to say that the claim in the present case arises out "of the common law. . . . The original common law right to "possession has been modified by the Rent Restrictions Act in "the case of houses to which the Act applies, and a claim for "the possession of such a house cannot any longer be made "under the common law, for the common law has gone."

In my view, a claim for possession of premises to which the Rent Acts apply is not a claim made at common law, but a claim made under the provisions of the Rent Restriction Acts. It follows from this that the plaintiffs' reply raises a new ground of claim in addition to that contained in the statement of claim and is irregular. I indicated, however, at the trial, that should I be of opinion that the reply was irregular, I would give the plaintiffs leave to amend their statement of claim by including in it an alternative claim for possession under the Rent Restrictions Acts. I give that leave now, but I will determine the question of costs after this judgment.

I have now to consider the claim for possession under the Rent Restriction Acts. Section 3 (1) of the Act of 1933 provides: "no order or judgment for the recovery of possession of "any dwelling-house to which the principal Acts apply or for "the ejectment of a tenant therefrom shall be made or given "unless the court considers it reasonable to make such an order "or give such a judgment, and either—(*a*) the court has power "so to do under the provisions set out in the First Schedule to "this Act." By the First Schedule the court has power to make such order or give such judgment if "(*a*) any rent lawfully due "from the tenant has not been paid, or any other obligation of "the tenancy (whether under the contract of tenancy or under "the principal Acts) . . . has been broken or not performed" and "(*d*) the tenant without the consent of the landlord has at "any time after September 1, 1939, assigned or sublet the whole "of the dwelling-house."

On behalf of the plaintiffs it was submitted that an obligation of the subtenancy had been broken or not performed. The alleged breach or non-performance was the assignment by Wroxall Estates Ld. to the second defendant without obtaining the written consent of the plaintiffs, the superior landlords. For reasons already stated, I am of opinion that there was no breach of the covenant in the sublease not to assign or part with the possession of the premises without the consent of the landlady and the superior landlords. The first defendant consented to this assignment to the second defendant and did not require Wroxall Estates Ld. to obtain the consent of the superior landlords, the plaintiffs, as a term of her consent. Although there was no breach of that covenant there was, in one sense, a non-performance of that covenant. I have to consider whether such a non-performance, although it does not amount to a breach of obligation under the tenancy, can still be a non-performance within the meaning of para. (*a*) of the schedule to the Rent Act of 1933. The words of para. (*a*) "other obligation of the "tenancy" must mean obligations imposed by the tenancy under which the tenant holds at the time of the non-performance of the obligation. In this case the tenancy under which Wroxall Estates Ld. held, and the second defendant held, was the subtenancy and, even after November 11, 1951, the second defendant still held upon the terms of that subtenancy, so far as they were applicable. There was, therefore, no failure of performance of which the plaintiffs could take advantage, as there was no failure of performance of any obligation owed to the plaintiffs. Apart from this view, I am of opinion that the words "non-perform-"ance" in para. (*a*) of the schedule mean a non-performance which amounts to a breach of obligation under the tenancy, and that the words "has been broken or not performed" mean no more than an active or passive breach of obligation, a breach either by action or by inaction.

In the result, the plaintiffs have failed to satisfy me that I have power under para. (*a*) of the schedule to make an order or a judgment for possession of the premises in question.

There next comes the plaintiffs' contention that I have power, under para. (*d*) of the schedule, on the ground that the tenant, without the consent of the landlord, has at any time after September 1, 1939, assigned or sublet the whole of the dwelling-house. It is true, and it is admitted, that Wroxall Estates Ld. assigned their interest in the sublease and thereby assigned the whole of the dwelling-house to the second defendant, without the consent of the plaintiffs. But were the plaintiffs the landlords of Wroxall Estates Ld. at the time of such assignment? In my view they were not. The landlord of Wroxall Estates Ld., at that time, was the first defendant, Miss Strutt, and she in fact gave her consent to the assignment. I must, therefore, reject the plaintiffs' contention on this ground also.

The final question, whether I consider that it would be reasonable to make such an order if I was satisfied that I had, by reason of para. (*a*) or para. (*d*) of the schedule of the Act of 1933, power to make such order or give such judgment, does not arise. In case, however, another court may differ from me and consider that this question does arise, and as it is a matter for my discretion, I will state my views on the question and the facts I find in relation thereto.

The second defendant, Commander Dugdale, is the owner of estates in Wroxall, Warwickshire, of the value of approximately £70,000. He has a residence at "Salterton," Middle Woodford, Salisbury, Wiltshire. He has business interests in Johannesburg and in the Bahamas, and these interests take him abroad during January, February and March in each year. When in this country, from May to December, he resides, when not in London, at his residence at "Salterton." He is in London on four or five days a week, and when in London he stays at the demised premises, No. 1, Chester Close. He has furniture there and a woman goes in daily to clean and look after the premises during the whole year. It is clear that the effect of the assignment of the sublease to Commander Dugdale was to give his occupancy the protection of the Rent Restriction Acts, which would not have been available to him if Wroxall Estates Ld. had remained the subtenants. If the plaintiffs had been asked to give their consent, I am satisfied that they would have refused to do so, as they want the demised premises for occupation as a residence for one of their employees and also as a means of more convenient access to some nine rooms, at present not in use, which they say they require for the purpose of their business. Although Commander Dugdale is, no doubt, a respectable and responsible person, the plaintiffs would not, in my view, have been acting unreasonably in refusing their consent to the assignment of the sublease to him, as such an assignment would give his occupancy the protection of the Rent Restriction Acts which he would otherwise not have had (*Swanson* v. *Forton*[6]). If, therefore, contrary to my view, there was a non-performance of an obligation, within the meaning of para. (*a*) of the schedule to the Rent Act of 1933, or an assignment without the consent of the landlord under para. (*d*) of that schedule, by the assignment of the sublease to Commander Dugdale, I should have held, in all the circumstances of this case, that it would be reasonable to make an order for possession against the second defendant. Taking the view, however, which I do, there must be judgment for both the defendants.

---

[6] [1949] Ch. 143; 65 T.L.R. 178; [1949] 1 All E.R. 135.

Judgment for defendants.

The plaintiffs appealed.

L. J. Belcourt for the plaintiffs. The Wroxall Estates Co., being a limited company, could not as subtenants claim the protection of subsection (3) of section 15 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. It is suggested that the assignment to the second defendant, Commander Dugdale, a director of the company, was a deliberate device to attempt to secure that protection. It is submitted, however, that section 15 (3) does not apply to or protect an assignee, and the second defendant is not a "subtenant to whom the premises were sub-"let." The context requires that the only subtenant to be considered is an original subtenant, because the words of section 12 (1) (*f*) and (*g*) are inapt to cover an assignee. If the draughtsman had intended to cover assignees he would have said so. If the words can be construed as covering an assignee, then it is submitted that to obtain the protection afforded by section 15 (3) not only must the assignment to Commander Dugdale be lawful, but all the steps leading up to that assignment must be lawful. The assignment to him was unlawful, because there was a breach of the covenant, inserted in the original lease to the first defendant and the subsequent subleases to Mrs. Sykes and the Wroxall Estates Co., requiring the consent of the head-landlord to be obtained. Arising out of the licence to sublet granted by the head-landlord to Miss Strutt there was an implied obligation on her not to release the subtenants, Wroxall Estates Co., from the covenant not to sublet without first obtaining the head-landlord's consent. If, as is alleged, she did release the company from that obligation, then she was in breach of that covenant. If she did not release the company from that obligation, then Wroxall Estates Co. were in breach. The covenant was inserted for the protection of the head-landlord and he is entitled to take advantage of it. In either case the breach of the covenant rendered the assignment unlawful and the second defendant is not entitled to the protection of section 15 (3). The subsection must be construed strictly because it takes away the rights of the head-landlord.

[DENNING L.J. This covenant seems to me to be distinctly within the words of section 56 of the Law of Property Act, 1925, so as to enable the superior landlord to take the benefit of it. The width of that section is shown by the recent decision of Danckwerts J. in *Stromdale and Ball* v. *Burden.*[7]]

[Romer L.J. Support for that view is to be found from the preceding covenant as to loss by fire. It would be strange if the superior landlord could not take advantage of that covenant.]

The covenant in the sublease was intended for the superior landlord's benefit and comes within the dicta of Lord Greene in *White* v. *Bijou Mansions.*[8]

L. A. Blundell and *D. J. Hyamson* for Miss Strutt (first defendant). The first defendant is not interested in the question of possession, but resists the plaintiffs' claim for damages for breach of contract.

Montague Waters for the second defendant. Miss Strutt, through her solicitors, consented to the assignment to the second defendant with full knowledge that the consent of the head-landlord had not been obtained, and not requiring that it should be obtained. In that way she waived that consent. As the head-landlord was not a party to the sublease he cannot rely on the fact that his consent was neither sought nor obtained for the assignment to the second defendant. Miss Strutt, even if she knew that the head-landlord would refuse his consent, had a right to release her sublessees from the covenant, and the judge so held. He held that the head-landlord, not being party to the sublease to Wroxall Estates Co., could not enforce the covenants in it; that Miss Strutt alone could enforce them; and if she thought fit to release Wroxall Estates from the obligation the head-landlord could not complain. Commander Dugdale is entitled to the protection of section 15 (3). Section 56 of the Law of Property Act, 1925, is of very limited application. In *White* v. *Bijou Mansions*[8] Simonds J. confined it to persons "with whom" a covenant is purported to be made.

[Somervell L.J. I doubt whether the section is so limited. There may be many cases where a person is within the benefit of the covenant although it is not in terms expressed to be "with "him."]

Stromdale and Ball v. *Burden*[9] was a case of the grant of an "interest in land."

[Somervell L.J. But Danckwerts J. also put it on the ground of an "agreement respecting land."]

---

[7] [1952] Ch. 223; [1952] 1 All E.R. 59.

[8] [1937] Ch. 610, 625; [1937] 3 All E.R. 269.

[9] [1952] Ch. 223.

C. A.

1953

Drive Yourself Hire Co. (London) Ld. *v.* Strutt.

[The following cases were also referred to by counsel in argument: *Mackusick* v. *Carmichael* [10]; *Williamson* v. *Williamson* [11]; *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*[12]; *In re Spark's Lease, Berger* v. *Jenkinson* [13]; *Mackley* v. *Nutting* [14]; *Norman* v. *Simpson* [15]; *Maley* v. *Fearn* [16]; *Dalrymple's Trustees* v. *Brown* [17]; *Lord Hylton* v. *Neal* [18]; *Oak Property Co.* v. *Chapman and Another* [19]; *Regional Properties Co.* v. *Frankenschwerth* [20]; *Keeves* v. *Dean* [21]; *R.M.R. Housing Society* v. *Combs* [22]; *Haywood* v. *Silber* [23]; *Dyson* v. *Foster* [24]; *In re Schebsman* [25]; *Smith and Snipes Hall Farm* v. *River Douglas Catchment Board* [26]; *Swanson* v. *Forton* [27]; *Glossop* v. *Ashley*,[28] and *Wilkes* v. *Goodwin*.[29]]

Cur. adv. vult.

November 24. The following judgments were read.

Somervell L.J., having stated the facts, and read the material licences and subleases, and section 15 (3) of the Act of 1920, continued: The first point submitted on behalf of the plaintiffs is that subsection (3) of section 15 does not apply to or protect assignees of subleases. In considering the argument one must bear in mind the definitions under section 12 (1) (*f*). The expression "tenant" includes any person from time to time deriving title under the original agreement. Under section 12 (1) (*g*) the expression "tenant" and "tenancy" include "subtenant" and "subtenancy," and the expression "let" includes "sublet." These, I think, are the relevant definitions which govern the construction of the subsection unless the context otherwise requires. It is clear, I think, that the second defendant is a subtenant. The fact that he is an assignee does not prevent his being a subtenant, but it is said that he is not a subtenant "to whom the premises were sublet," the subletting was to Mrs. Sykes. The context therefore, it is said, requires that the only subtenant to be considered is an original subtenant, because the words are inapt to cover an assignee.

---

[10] [1917] 2 K.B. 581; 33 T.L.R. 497.

[11] (1874) L.R. 9 Ch. 729.

[12] [1926] A.C. 108.

[13] [1905] 1 Ch. 456.

[14] [1949] 2 K.B. 55; 65 T.L.R. 255; [1949] 1 All E.R. 413.

[15] [1946] K.B. 158; 62 T.L.R. 113; [1946] 1 All E.R. 74.

[16] (1946) 62 T.L.R. 693; [1946] 2 All E.R. 583.

[17] 1945 S.C. 190.

[18] [1921] 2 K.B. 438.

[19] [1947] K.B. 886.

[20] [1951] 1 K.B. 631; [1951] 1 All E.R. 178.

[21] [1924] 1 K.B. 685.

[22] [1951] 1 K.B. 486; [1951] 1 T.L.R. 1; [1949] 1 All E.R. 16.

[23] (1885) 30 Ch.D. 404.

[24] [1909] A.C. 98.

[25] [1944] Ch. 83; 60 T.L.R. 128.

[26] [1949] 2 K.B. 500; 65 T.L.R. 628; [1949] 2 All E.R. 179.

[27] [1949] Ch. 143; 65 T.L.R. 178; [1949] 1 All E.R. 135.

[28] [1922] 1 K.B. 1.

[29] [1923] 2 K.B. 86.

There is, I think, force in this, and I doubt whether the legislature directed its attention to the position of assignees. Having regard, however, to the definition in section 12 (1) (*f*) and the purpose of the section to be gathered from its terms, I have come to the conclusion that it should be construed as covering assignees. Leaving aside for the moment the meaning of "lawfully," it would seem clear that if the assignee is to get the protection of the section the assignment to him must be "lawful." One could imagine a case where the head-landlord was a party to the sublease which required his consent for an assignment. In such a case he must plainly be able to rely on the unlawfulness of an assignment made without his consent. It is, I think, equally clear that he must be able to rely on the unlawfulness, if it exists, of the original subletting. One, therefore, has to expand the words after subtenant so as to read "to "whom the premises, or any part thereof, have been lawfully "assigned by or under a subtenant to whom they have been "lawfully sublet."

I will now turn to the meaning of "lawful." In *Norman* v. *Simpson* [1] the court took the view that premises were unlawfully sublet if the head-lessor had a subsisting right of re-entering. That formula was considered in *Maley* v. *Fearn*.[2] In that case a tenant had sublet in breach of a covenant which required that there should be no subletting except with the consent of the landlord. It was held that the part sublet had not been lawfully sublet, but the court doubted whether, if the subletting was contrary to the terms of the covenant, it would be necessary to show that it gave rise to a right of re-entry. Morton L.J. was a party to both decisions, and in the latter decision he expressed the opinion that a right of re-entry was not a necessary condition of unlawfulness. I agree with this.

It is said here, in the first place, that as the head-landlord was not a party to the sublease he cannot rely on the fact that his consent was neither sought nor obtained. It is said, in the second place, that the first defendant had a right to release Wroxall Estates from the provision which required the head-landlord's consent, and that she did so. I think that the first question to be considered is whether there was any implied obligation arising out of the licence. It was suggested in the pleadings that the first defendant impliedly undertook to impose the term upon and, if necessary, enforce the term against the underlessee and her successors in title. I think that this is putting the obligation too widely. It has been said countless times that terms cannot be implied unless it is necessary to give efficacy to the agreement. It is suggested here, on behalf of the defendants, that Miss Strutt, even if she knew that the head-landlord would object if approached, could release her sublessee from the term requiring the head-landlord's consent. If this were right the agreement which the licence document evidences would, it seems to me, have no efficacy at all. The position would be precisely the same as if the first defendant's consent only was required. I think, therefore, that under this contract the first defendant impliedly undertook not to release or waive her right to require the superior landlord's consent.

---

[1] [1946] K.B. 158; 62 T.L.R. 113; [1946] 1 All E.R. 74.

[2] (1946) 62 T.L.R. 693; [1946] 2 All E.R. 583.

Though I do not myself think that it would have affected the result, I will deal here with the suggestion that the first defendant, through her solicitors, waived or purported to waive the position with regard to the superior landlord's consent. The solicitors concerned did not give evidence, so the matter turns on inferences from letters. On November 30, 1950, the solicitor for Wroxall Estates wrote to Miss Strutt: "Your tenants Messrs. "Wroxall Estates Ld. wish to assign the lease to their managing "director, Mr. James Dugdale. We are therefore writing to ask "for permission for the assignment of the premises to Mr. Dug-"dale. We do not know whether you will require references "having regard to Mr. Dugdale's position in the company, but "if you do require them please let us know and we will forward "them. Do you know whether under your own lease it is "necessary for you to obtain the permission of your own land-"lord to an assignment of the underlease? If so, it will be "necessary to get the permission of the Drive Yourself Hire "Company (London) Limited who, we understand, are the "superior landlords."

Miss Strutt herself sent an answer to that: "I do not think "it is necessary for me to get permission for me to grant an "assignment of 1A Chester Street. I should like references as "per usual. I have been laid up for weeks with a concussion, "owing to falling on my head, and am only allowed any urgent "business. I will get someone to speak to my lawyer. I see "no reason against Mr. Dugdale having the lease. Yours truly, "Emily Strutt." The matter was referred to her solicitors, and they wrote on January 1: "We act for Miss Emily Strutt "and she has now forwarded to us your letter to her of November 30, with instructions. She regrets that this letter has not "been answered before, but this has been through the illness "of our client. We think it as well for the usual references to "be submitted of Mr. Dugdale and perhaps you will kindly let "us have these at your convenience. There appears to be no "necessity to obtain the permission of our client's superior "landlords to grant your clients, Wroxall Estates Limited, a "licence to assign the lease to Mr. Dugdale." I read this last letter as dealing with the question put in the first, namely, as to the headlease. Those are the letters, and the consent given by the first defendant was dated February 28. It contains a fairly long recital, which unfortunately omits any reference to the clause of the sublease which deals with assignments.

The judge thought that the letter of January 1 ought to be treated as a consent to the assignment of the sublease without requiring Wroxall Estates Ld. to obtain the consent of the plaintiffs. He relied, I think, on contemporary references to the sublease dealing with repairs as evidence that the solicitors had the terms of the sublease before them. The only explanation, to my mind, of these and some later letters consistent with honesty, which everyone accepts, is that both firms of solicitors had completely failed to remember or remind themselves of paragraph 2 (x). There was therefore a breach of that provision. The question is whether that prevents the assignment being lawful within section 15 (3) having regard to the fact that it is the superior landlord, who was not a party, who is seeking to say that the assignment was unlawful.

The provision here was, I think, an unusual one. It may well be that as a general rule breaches of provisions in a sublease of which the sublessor can take advantage would be irrelevant in considering the position of a subtenant or assignee in cases where the head-landlord was the plaintiff. The provision which was broken here was, however, one inserted for his protection under an agreement by the first defendant with him, with the terms and implications of which I have already dealt. I have come to the conclusion that in those circumstances there was not a lawful assignment to the second defendant within section 15 (3), as construed to bring assignees within its ambit. I should, perhaps, have mentioned that the plaintiffs' objection to the second defendant is not personal, but based on the fact that the assignor, being a limited company, could not have claimed the protection of the Acts.

Various other points were argued which it is not necessary to consider. It was submitted that if the second defendant was within section 15 (3) the plaintiffs could maintain that there had been a breach of paragraph (*d*) of the Schedule to the Act of 1933, which deals, inter alia, with cases where the whole of the premises have been assigned or sublet. If that were right it would give the court jurisdiction to make an order, if the court thought it were reasonable to do so. The judge came to the conclusion that the submission failed, though he indicated that if the plaintiff had brought himself within that sub-paragraph he would have thought it reasonable to make an order. I express no opinion on this point, which had better be left over until it is necessary to decide it.

The point on which I differ from the judge is a narrow one. The word "lawful" is not an easy one to construe and apply, but for the reasons which I have given I think that in the special circumstances which existed in this case the defence fails. I would allow the appeal.

DENNING L.J. The first question is whether in section 15 (3) of the Act of 1920 the word "subtenant" includes not only the original subtenant, but also an assignee of a subtenant. I think that it does: but, if this is done, I think that the words "lawfully sublet" must be expanded so as to include the process by which the assignee becomes subtenant. They include, not only the original subletting, but also the assignment. All the steps by which the subtenant becomes a subtenant have to be lawful before he can get the benefit of section 15 (3). This means at any rate that they must not be in breach of contract: for to break a contract is an unlawful act: see *South Wales Miners' Federation* v. *Glamorgan Coal Co.*[3]

In the present case all the steps by which Commander Dugdale became subtenant were clearly lawful except the last step by which Wroxall Estates Ld. assigned the sublease to him. The sublease contained a specific covenant that the subtenant would not assign the premises "without the consent of the land-"lady (Miss Strutt) and the superior landlord, such consent "not to be unreasonably withheld in the case of a respectable "and responsible person." In so far as the covenant required the superior landlord's consent, it was inserted at the express request of the superior landlord and for his benefit. Indeed, he insisted on it. When Wroxall Estates Ld. assigned the sublease to Commander Dugdale, they ignored that obligation. They obtained the consent of the landlady, Miss Strutt, but did not obtain the consent of the superior landlords. If Wroxall Estates Ld. had asked the superior landlords for their consent, the superior landlords could quite reasonably have refused to give consent; because Commander Dugdale would have become a protected tenant, whereas Wroxall Estates Ld. were unprotected: *Lee* v. *K. Carter Ld.*[4]

---

[3] [1905] A.C. 239; 21 T.L.R. 441.

Notwithstanding the fact that Wroxall Estates Ld. did not obtain the consent of the superior landlord in accordance with the covenant, the judge has held that the assignment to Commander Dugdale was lawful. The reason he gave was that the superior landlords were not parties to the sublease and could not enforce the covenants in it. It was, he held, for Miss Strutt alone to enforce it, and if she thought fit to release Wroxall Estates Ld. from the obligations of it, the superior landlords could not complain.

There is, I think, one short and decisive answer to this reasoning: when Mr. Payne, the predecessor of the superior landlords, gave his consent, giving Miss Strutt, the tenant, permission to grant a sublease, he insisted that the underlease should contain a covenant by the underlessee not to assign the premises without the warrant of the superior landlord, and those claiming under him. The consent thus given by Mr. Payne to Miss Strutt became a contract between them as soon as it was acted upon. It was clearly an implied term of that contract that Miss Strutt, the tenant, should not release the subtenants from the obligation to get the superior landlord's consent: and the benefit of this implied term ran, I think, with the reversion so that not only Mr. Payne, but also his successors in title, could take advantage of it: see *Smith and Snipes Hall Farm Ld.* v. *River Douglas Catchment Board*,[5] and *Boyer* v. *Warbey*.[6] If Miss Strutt did release the subtenants (Wroxall Estates Ld.) she herself was acting unlawfully, because she was breaking the implied term. If she did not release the subtenants, then the subtenants (Wroxall Estates Ld.) were acting unlawfully in that they assigned in breach of their obligation to her to obtain the superior landlord's consent. In either case the process was unlawful.

---

[4] [1949] 1 K.B. 85; 64 T.L.R. 536; [1948] 2 All E.R. 690.

[5] [1949] 2 K.B. 500; sub nom. *Smith* v. *River Douglas Catchment Board*, 65 T.L.R. 628; [1949] 2 All E.R. 179.

[6] [1953] 1 Q.B. 234; [1953] 1 All E.R. 269.

If I am wrong, however, in holding that there was such an implied term—and if the correct view is that Miss Strutt fulfilled all her obligations to the superior landlord by inserting the covenant in the sublease, which is what the judge thought—then I am still of opinion that the action of Wroxall Estates Ld. was unlawful. They deliberately broke a covenant which was inserted for the benefit of the superior landlords. Such a breach was, I believe, unlawful although the superior landlord was not a party to the instrument. I say this because the case seems to me to fall precisely within the words of section 56 of the Law of Property Act, 1925, which says that " A person may take . . . the " benefit of any . . . covenant . . . respecting land or other " property, although he may not be named as a party to the . . . " instrument."

In the course of the argument Romer L.J. drew attention to the preceding covenant in the sublease whereby the subtenant, in case of the premises being destroyed by fire, agreed in certain circumstances to pay to the superior landlord the loss thereby occasioned to him. Surely the superior landlord could under section 56 take the benefit of that covenant. So, also, under this covenant about assigning the superior landlord can, I think, take the benefit of it by requiring his consent to be obtained. I do not say that for breach of it the superior landlord could forfeit the sublease. He clearly could not do so, because the proviso for re-entry was not inserted for his benefit. Only the covenant was for his benefit. But he is at least entitled to say that an assignment in breach of the covenant is unlawful. It should be noticed that in *Haywood* v. *Silber*[7] this court insisted on such a covenant being inserted in a sublease for the benefit of the superior landlord: and they would not have done so if they had thought that it was no good to him.

Mr. Montague Waters argued, however, that section 56 must be limited to persons " with whom some agreement or covenant " is purported to be made," relying on the observations of Simonds J. in *White* v. *Bijou Mansions Ld.*[8] If the covenant had been formally expressed to be " with " the superior landlord, it would, he said, have been enforceable by the superior landlord, although he was not a party: but as it was not so expressed,

[7] (1885) 30 Ch.D. 404.

[8] [1937] Ch. 625; [1937] 3 All E.R. 269.

it was not enforceable. But, as Somervell L.J. pointed out in the course of the argument, that may be too narrow an interpretation to place on the words used by Simonds J. Enforceability does not depend on the form of the obligation, but on the substance of it. A covenant is, for this purpose, sufficiently made "with" a person if it is, on the face of it, made directly for his benefit in such circumstances that it was intended to be enforceable by him. In support of this view, I would refer to the recent case of *Stromdale & Ball* v. *Burden*,[9] where Danckwerts J., as one ground of his judgment, held that an option to purchase was enforceable by a company as an "agreement respecting land," although the company was not a party to the instrument and the agreement was not expressed in terms to be "with" the company.

Much of the difficulty that has surrounded section 56 has arisen from an inadequate knowledge of the history of the subject. It is often said to be a fundamental principle of our law that only a person who is a party to a contract can sue on it. I wish to assert, as distinctly as I can, that the common law in its original setting knew no such principle. Indeed, it said quite the contrary. For the 200 years before 1861 it was settled law that, if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the promise at his instance, although he was not a party to the contract. That was clearly laid down by the Court of Exchequer Chamber in 1677 in *Dutton* v. *Poole*.[10] One hundred years later it was so well accepted that Lord Mansfield said that it was a matter of surprise how a doubt could have arisen about it, *Martyn* v. *Hind*[11]; and Buller J. said quite categorically that "if one person makes a promise to another for "the benefit of a third person, that third person may maintain "an action on it": see *Marchington* v. *Vernon*.[12] Finally, in 1823, the Court of King's Bench, then in its golden age, including as it did Abbott C.J., Bayley and Holroyd JJ., specifically so held: see *Carnegie* v. *Waugh*.[13] And in 1844 Joseph Chitty, in his highly authoritative work on Pleading, treated the law as settled accordingly: see the 7th ed., vol. 1, pp. 4 to 5. He would be a bold man who would say that a principle supported by the names I have mentioned did not represent the law of England, especially when it is so eminently just and reasonable.

---

[9] [1952] Ch. 223; [1951] 2 T.L.R. 1192; [1952] 1 All E.R. 59.

[10] (1678) 2 Lev. 210.

[11] (1776) Cowp. 437, 443.

[12] (1787) 1 Bos. & P. 101n.

[13] (1823) 2 Dowl. & Ry. 277.

So much for simple contracts. It was different with contracts under seal, as Abbott C.J. himself pointed out in *Carnegie* v. *Waugh.*[13] There was an inflexible rule that no one could sue on an indenture inter partes unless he was named as a party to it. Numerous examples of this rule will be found from *Gilby* v. *Copley*[14] in 1684 to *Chesterfield & Midland Silkstone Colliery Co. Ld.* v. *Hawkins*[15] in 1865. But that rule was strictly confined to indentures made between parties, that is, indentures which specifically named the parties to it in a formal way, as by saying "This indenture made between John "Doe of the one part and Richard Roe of the other part": see Chitty, ibid., at p. 3. The rule never applied to a deed poll or to an indenture which was not expressed to be made between parties. The result was that if the indenture did not specifically name the parties in formal fashion, but started off simply by saying that "This Indenture witnesseth that John "Doe and Richard Roe have agreed as follows," stating their agreement and followed by their signatures, then the common law allowed a third party to sue on a covenant contained therein which was made expressly for his benefit. This was laid down in 1673 in *Cooker* v. *Child,*[16] and was applied in striking fashion recently by Vaisey J. in *Chelsea and Walham Green Building Society* v. *Armstrong.*[17]

Such was the state of the law in 1845 when Parliament passed section 5 of the Real Property Act, 1845. That section abolished the technical rule about indentures so far as land was concerned. It enabled a person to take the benefit of a covenant over or respecting land, although he was not named as a party to the indenture. Naturally enough, that section only applied to indentures, because in 1845 they were the only documents in which the law needed to be remedied. In all other cases at that time a third party could sue.

In 1861, however, came the unfortunate case of *Tweddle* v. *Atkinson,*[18] in which the Court of Queen's Bench departed from the law as it had been understood for the previous 200 years and held quite generally that no stranger could take advantage of a contract, though made for his benefit: and that was assumed, without argument, to be the law by the House of Lords in

[13] 2 Dowl. & Ry. 277.

[14] (1684) 3 Lev. 138, 140.

[15] (1865) 3 H. & C. 677.

[16] (1673) 2 Lev. 74.

[17] [1951] Ch. 853; [1951] 2 T.L.R. 312; [1951] 2 All E.R. 250.

[18] (1861) 1 B. & S. 393.

C. A.
1953

Drive Yourself Hire Co. (London) Ld. v. Strutt.

Denning L.J.

Dunlop Pneumatic Tyre Co. Ld. v. *Selfridge & Co. Ld.*[19] I do not pause to consider whether this new rule was legitimately introduced into the law. Incidentally, the courts of the United States have not adopted this new rule. They have followed the original common law, which is much more in accord with the needs of a civilized society. So is the Scots law. But what I do suggest is that the rule in *Tweddle* v. *Atkinson*[20] was itself greatly modified by section 56 of the Law of Property Act, 1925. Just as the 1845 Act modified the old technical rule about indentures, so the 1925 Act modified the new technical rule about contracts generally. Section 56 applies, not merely to indentures, but to any instrument of agreement: and it applies not only to land, but to any property, real or personal. It says that "A "person may take . . . the benefit of any . . . covenant . . . "respecting land or other property, although he may not be "named as a party to the . . . instrument." I can think of no words more apt to do away with the rule in *Tweddle* v. *Atkinson*,[20] leaving the courts free, in cases respecting property, to go back to the old common law, whereby a third party can sue on a contract made expressly for his benefit; and rid also of the old rule about deeds inter partes.

In support of this view I would like to give some modern instances: first, there is the important decision which I have already mentioned of Vaisey J. in *Chelsea and Walham Green Building Society* v. *Armstrong*.[21] A man who had mortgaged a house sold it to a purchaser. In the deed of transfer (which was not inter partes) the purchaser covenanted that he would pay the future instalments to the building society. The building society was not a party to the transfer, but Vaisey J. held that the building society could enforce the covenant by direct action against the purchaser. For this purpose he went back to the old case of *Cooker* v. *Child*,[22] but he could not have done this unless the rule in *Tweddle* v. *Atkinson*[20] had been done away with so as to permit him to go back to the old common law. If it is permissible to go back to *Cooker* v. *Child*,[22] why not also go back to *Dutton* v. *Poole*[23] in the same volume of Levinz, especially as it has never been over-ruled by any court of competent authority?

Next there is the recent decision of Danckwerts J. in *Stromdale & Ball* v. *Burden*.[24] A deed of licence (which was inter partes) gave an option to purchase to a company which was not a party to the deed. The company could not have sued at common law because the deed was inter partes. But by virtue of section 56 it was held entitled to do so. Finally, in regard to simple contracts, I would refer to the cases which I mentioned in *Smith and Snipes Hall Farm* v. *River Douglas Catchment Board*,[25] namely, commercial credits, pension agreements, and household insurances. No court would, I fancy, deny the third party a remedy in such cases: and the remedy is to be found by recourse to the old common law.

---

[19] [1915] A.C. 847; 31 T.L.R. 399.
[20] 1 B. & S. 393.
[21] [1951] Ch. 853.
[22] 2 Lev. 74.
[23] 2 Lev. 210.
[24] [1952] Ch. 223.

My conclusion is, therefore, that section 56 applies so as to entitle the superior landlord to take the benefit of this covenant although he was not named as a party to the underlease in which it was contained. The assignment to Commander Dugdale was unlawful because the consent of the superior landlord was not obtained. He is therefore not protected by section 15 (3) of the Act of 1920.

In these circumstances there is no reason to consider paragraphs (*a*) and (*d*) of the schedule to the Act of 1933, and I do not do so. I agree with my Lord that this appeal should be allowed.

ROMER L.J. I agree. The first question to consider is whether the protective provisions of section 15 (3) of the Act of 1920 extend to an assign from a sublessee or whether they are confined to sublessees themselves. The subsection refers in terms only to subtenants to whom premises have been sublet, and it is not altogether easy to fit assignees into the language which the draftsman used. Nevertheless, a person to whom a sublease is assigned undoubtedly becomes the subtenant of the immediate reversioner, and it would be a curious intention to attribute to Parliament that an original sublessee is protected, but not an assignee from him, in cases, for example, where the head-lessor has expressly approved both the sublease and the assignment thereof. In my opinion assignees of underleases are in fact within the subsection, not merely as a matter of expectation, but by virtue of the definitions of "tenant" in section 12 (1) (*f*) and (*g*) of the Act. The difficulty of applying the language of section 15 (3) to undertenants by assignment is not such, in my judgment, as to oust these definitions from the subsection by reason of the excluding preface to section 12 (1) "except

---

[25] [1949] 2 K.B. 515.

"where the context otherwise requires." I think that section 15 (3) may reasonably be read as applying both to sublessees and their assigns, but so that no assign can invoke it unless both the sublease and the assignment thereof are "lawful" in relation to the superior lessor or lessors who would, but for the subsection, be entitled to possession of the premises subdemised. Whether the word "lawfully" has an even wider scope it is not, for present purposes, necessary to consider.

On the construction which I have attributed to section 15 (3) the second defendant, Commander Dugdale, is entitled to rely upon it, provided that the assignment to him by Wroxall Estates Ld. was valid not only as against Miss Strutt but as against the head-lessors when Miss Strutt's lease fell in, on which date this defendant was in possession (in reliance on section 15 (3)) of the whole of the premises demised.

Was, then, this defendant's assignment "lawful" as against the head-lessors? To answer this question it is necessary to inquire as to the relevant rights which Mr. Payne acquired in relation to the property and to which the plaintiffs have, at all material times, been entitled as his successors. Mr. Payne was the freeholder of the property and it is clear that, when he leased it to Miss Strutt, he attached considerable importance to retaining control over the persons who might from time to time occupy the premises under a title deriving from her. Such control could in fact only be achieved with certainty by his insisting upon being a party himself to all subsequent dispositions of the property by way of assignment or sublease. After the grant of the lease to Miss Strutt there was a variety of ways in which the property might change hands during the term of the demise. Miss Strutt might, for example, assign the term and subsequent assignments might follow; or she might grant a sublease and other persons might acquire an interest by assignment or underlease from the sublessee. Mr. Payne might have so arranged matters when he granted the head-lease that none of these subsequent devolutions could be validly effected except by instruments which imposed upon the taker of each successive interest a covenant contractually enforceable by the head-lessor, against assigning or subletting except with his own consent.

This course, however, is somewhat burdensome, especially in the case of a large estate, and, whether for this reason or some other, Mr. Payne did not think proper to adopt it; instead, he introduced into the licence to Miss Strutt a condition, the effect of which was that her sublessee should covenant with her not to assign or further sublease without both her consent and his, and this condition was duly incorporated by way of covenant in the underlease which Miss Strutt, in pursuance of such licence, granted to Mrs. Sykes. It was contended before us, on behalf of the second defendant, that in these circumstances, Miss Strutt, the covenantee, could at any time, and without the head-lessor's consent, and, indeed, without reference to him at all, release Mrs. Sykes and any person, claiming through or under her, from the burden of this covenant. Whether in fact she released Wroxall Estates Ld. from their obligation to her to obtain the plaintiffs' consent, when the company assigned the sublease to the second defendant, depends on the effect of the letters which passed at the time and is a matter which may be open to question; but, if she did, I am satisfied that she had no right, as against the plaintiffs, so to do. I quite agree with my Lords that the licence which Mr. Payne granted to Miss Strutt to sublet gave rise to an implied promise by this lady not to release from its operation any person claiming through her who became bound by covenant. Such a release would render the condition upon which the licence was given altogether useless and abortive to the head-lessor.

If Miss Strutt had not agreed to accept the condition she would not have got the licence at all; the condition was, in fact, the consideration for the licence, and it would be against conscience that she should take the benefit and disregard the obligation. I do not for one moment suggest that this was what she intended to do when the company asked for her consent to assign to the second defendant, for neither she nor, apparently, her solicitors had any appreciation of the plaintiffs' rights; but had the plaintiffs ascertained that it was proposed to effect an assignment without their own consent I have no doubt but that the court would, on their intervention, have restrained the company from acting in disregard of such consent and Miss Strutt from purporting to authorize them to do so. The plaintiffs did not, however, hear of the assignment to the second defendant in time to apply to the court, and it was accordingly carried through without their knowledge.

It is in these circumstances that the question arises whether the second defendant can claim that the assignment was "lawful" and thus defeat the claim which the plaintiffs have brought for possession of the premises. In my opinion this question must be answered in the negative. So far as Miss Strutt and Wroxall Estates Ld. and Commander Dugdale are concerned it may well be that the assignment was perfectly valid. Miss Strutt gave her consent to it and at no time subsequently challenged it in any way. The company acted in breach of their covenant with Miss Strutt, but I think myself that it would have been difficult for her to have made this the subject of legal complaint in view of the letters which passed, and in any event, as I have said, she never attempted to do so. Nor could either Miss Strutt or the company set up any invalidity in the assignment as against Commander Dugdale. In my judgment, however, the matter by no means rests there. One of the results of section 15 (3) is undoubtedly to foist upon landlords, in many cases, tenants whom they do not wish to have and whose right of occupation may be of unforeseeable duration. This effect of the subsection was presumably known to the legislature, and I think that the word "lawfully," which was inserted for the protection of the landlord, should be given a reasonably wide construction.

It seems to me that the mere fact that a sublease or an assignment thereof is "lawful" as between the parties thereto does not of itself render it lawful as against a superior lessor. Now, when Wroxall Estates Ld. took their assignment from Mrs. Sykes the position would appear to be (though the point was not argued before us and I do not wish to be taken as expressing any definite opinion upon it) that the company were entitled to see the head-lease to Miss Strutt as well as the sublease by her to Mrs. Sykes (*Gosling* v. *Woolf* [26]), but not the licence which Mr. Payne gave to Miss Strutt (Law of Property Act, 1925, s. 45 (3)). It may be that notwithstanding section 44 (5) of the Act, the company had constructive notice of the licence, but the position as to this is somewhat obscure and it would be unsafe to deal with the case on the footing that they had. Even on the assumption, however, that the company neither knew nor had notice of the licence, and of the implied obligation upon Miss Strutt arising thereout, they knew of the covenant in the sublease requiring the head-lessor's consent; they knew also that when they took their own assignment this covenant was duly observed in that Mr. Payne's written consent thereto was obtained as well as that of Miss Strutt; and they must surely have known, as a matter of ordinary common sense, that the covenant was introduced solely for the benefit of the head-lessor, and not for the benefit of anybody else.

---

[26] [1893] 1 Q.B. 39.

C. A.
1953

DRIVE YOURSELF HIRE CO. (LONDON) LD. v. STRUTT.

Romer L.J.

As to Miss Strutt (who played an essential part in the transaction, for it could not lawfully have gone through without her consent) she knew, or must be taken to have known, of her obligation to her own reversioner which was implicit in the licence, and it is nothing to the purpose that it had escaped her mind when she acted (if, in fact she did so act) in disregard of it. In view of all of these considerations it is not possible to say, in my judgment, that the assignment was "lawful" within the meaning and intendment of section 15 (3) of the Act of 1920. It was in fact executed in plain breach of the rights of the plaintiffs, who had, and have, a greater interest in the property than any of the parties who were engaged in the transaction. The second defendant cannot, therefore, in my opinion, rely as against the plaintiffs upon the assignment as being a lawful document of title, and I agree that the appeal must be allowed.

On this view of the matter it becomes unnecessary to decide any of the other points which were argued before us (some of which, at least, I think are difficult), and I prefer to express no concluded opinion upon them.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *Merton Naydler; Farrer & Co.; Child & Child.*

A. W. G.

REGINA v. ALGAR.

C. C. A.
1953
Nov. 2, 9, 16.

Lord Goddard C.J., Croom-Johnson and Glyn-Jones JJ.

Criminal Law—Evidence—Witnesses—Competency—Husband and wife—Nullity—Voidable marriage—Criminal offences committed by husband during coverture—Nullity decree—Prosecution—Whether wife competent to give evidence against former husband.

Where a marriage has been lawfully contracted but is voidable at the suit of one of the parties and a decree of nullity is subsequently pronounced, one former spouse is not thereafter competent to give evidence against the other in respect of criminal offences committed by that other spouse during coverture.

A wife who had been lawfully married obtained a decree of nullity on the ground of her husband's impotence. After the decree had been pronounced she was called as a witness for the

---

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

prosecution at her former husband's trial for alleged criminal offences, namely forgeries, committed while the parties had been living together. The former husband appealed against conviction:—

Held, that the former wife's evidence was inadmissible, and as it concerned a vital point in the case the court could not apply the proviso and the conviction must be quashed.

APPEAL against conviction.

The appellant, Reginald Horace Algar, was married in 1934. There was no impediment to the marriage, which was duly and regularly celebrated. He lived with his wife until 1949. The wife was a woman of some means who had a substantial banking account, and in 1947 and 1948 the appellant forged her name to a number of cheques, thereby defrauding her bank of some £7,000. In 1949 the wife petitioned for a decree of nullity of marriage on the ground of her husband's impotence, and a decree of nullity was pronounced in March, 1950. She also, finding that her account had been depleted by forgeries, sued the bank, but the action was not heard until February, 1953, when, after one day's hearing, the bank submitted to judgment. The appellant was subsequently prosecuted at Norfolk Summer Assizes for forgery, and the prosecution called the former wife as a witness. The appellant was convicted and sentenced to five years' imprisonment. Leave to appeal against conviction and sentence was granted in order that the question of the former wife's competence to give evidence could be argued and determined.

J. H. Buzzard for the appellant. The evidence of the former wife was inadmissible. At common law husband and wife were precluded from giving evidence for or against each other with respect to matters which occurred during the continuance of the relationship even after the relationship had ceased: Roscoe's Criminal Evidence, 1st ed., p. 113.* That rule applied both to civil and criminal proceedings up to the passing of the Evidence (Amendment) Act, 1853. In *Monroe* v. *Twistleton* [1] it was held that the evidence of a divorced wife was inadmissible against her husband, and in that case Lord Alvanley said that "if she [a "divorced wife] might be a witness in a civil proceeding, she "might equally be so in a criminal prosecution; and it never shall "be endured that the confidence which the law has created while "the parties remained in the most intimate of all relations, shall

---

* 11th ed., p. 116.

[1] (1802) Peake Add.Cas. 219.

"be broken whenever, by the misconduct of one party . . . the "relation has been dissolved."[2] That reasoning might equally be applied to a voidable marriage which has been annulled. In *Doker* v. *Hasler*[3] the evidence of a widow was held to be inadmissible; and in *O'Connor* v. *Marjoribanks*[4] the rule was applied to a widow's personal representatives. In *Wells* v. *Fisher*[5] the evidence of a woman who had been bigamously married had been admitted on the ground that there had never been a valid marriage and therefore the marriage relationship had never existed, but in the note to that case *Doker* v. *Hasler*[6] was cited as authority for the proposition that where there has been a valid marriage no evidence can be received from either of the parties of declarations made by the other during a marriage even though it has been dissolved by death. In *O'Connor's* case[7] both Tindal C.J. and Maule J. discussed the reasons for the rule and said that it was based on the policy of the law to preserve conjugal confidence.[8] That case has never been doubted, and it is important because it approved the decision in *Monroe* v. *Twistleton*[9] and also confirmed the rule which had been laid down in Roscoe's Criminal Evidence.

The above-cited cases were all decided before the Evidence Acts of 1843, 1851 and 1853, which reformed the law of evidence. The Acts of 1843 and 1851 did not affect the position of husband and wife, but that of 1853 altered the common law position of husband and wife in civil proceedings. Section 1 of that Act provided that the husband and wife of the parties to any action should "except as hereinafter excepted be competent and compellable witnesses to give evidence . . . on behalf of either or any "of the parties to the action." The exception clearly referred to section 2, which was in the form of a proviso and which rendered the husband or wife incompetent to give evidence in criminal proceedings. In construing those two sections according to the ordinary canons of construction it is permissible to refer to the existing law, and since at common law the words "husband" and "wife" included "ex-husband" and "ex-wife," it is submitted that ex-husbands and ex-wives were intended to be covered by sections 1 and 2 of the Act. The only reason to doubt that construction arises from the decision in *Shenton* v. *Tyler*,[10] where

---

[2] Peake Add.Cas. 221.

[3] (1824) Ry. & M. 198.

[4] (1842) 4 Man. & G. 435.

[5] (1831) 1 M. & Rob. 99.

[6] Ry. & M. 198.

[7] 4 Man. & G. 435.

[8] Ibid. 443, 445.

[9] Peake Add.Cas. 219.

[10] [1939] Ch. 620; 55 T.L.R. 522; [1939] 1 All E.R. 827.

Sir Wilfrid Greene M.R., in interpreting section 3 of the Act, which is concerned with the rule of privilege in marital communications, held that the words "husband" and "wife" must be construed according to their ordinary meaning and did not include widows and widowers or divorced persons [11]; but that interpretation was based on the fact that there had been no rule of privilege at common law and therefore reference could not be made to the pre-existing law. In any case that was not a decision on competency, although the Master of the Rolls approved the decisions in *Monroe* v. *Twistleton*,[12] *Doker* v. *Hasler* [13] and *O'Connor* v. *Marjoribanks* [14] as being authorities on competence. But, in any event, if the words "husband" and "wife" in sections 1 and 2 of the Act do not include "ex-husband" and "ex-wife" there are no words in the Act which render them competent to give evidence for or against each other in criminal proceedings, and therefore the common law must still prevail except where it is specifically provided otherwise by modern statutes.

If the evidence of a divorced wife is inadmissible for or against her husband in criminal proceedings in respect of transactions which took place while the marriage was subsisting, the same principle should apply where a decree of nullity has been pronounced in the case of a voidable marriage, since the whole question depends upon the relationship of the parties at the time when the transaction took place. It has been held that, notwithstanding the form of the nullity decree, in a voidable marriage the status of husband and wife continues from the date of the marriage until the date when the decree of nullity is made absolute: *In re Eaves, Eaves* v. *Eaves*.[15] See also *Adams* v. *Adams* [16] and *De Reneville* v. *De Reneville*.[17] The criminal law looks rather to the substance than to the letter, and it would be contrary to common sense to say that because of the form of the decree one has to apply the letter of the law to such an extent as to continue the legal fiction that the parties to a voidable marriage were never man and wife in the eyes of the law.

Maxwell Turner for the Crown. It is conceded that if there had been a decree of divorce in this case, or if the prosecution had taken place before the decree absolute was granted, the evidence would have been inadmissible, but it is submitted that a decree absolute in nullity proceedings declares the marriage to have been null and void and therefore never to have been a valid marriage. Although the marriage never subsisted in law there are certain transactions done in the belief that the marriage subsisted which the law will not permit to be set aside after the decree absolute is granted. [Reference was made to *In re Eaves*, *Eaves* v. *Eaves*.[18]]

---

[11] [1939] Ch. 620, 641.
[12] Peake Add.Cas. 219.
[13] Ry. & M. 198.
[14] 4 Man. & G. 435.
[15] [1940] Ch. 109; 56 T.L.R. 110; [1939] 4 All E.R. 260.
[16] [1941] 1 K.B. 536; 57 T.L.R. 329; [1941] 1 All E.R. 56.
[17] [1948] P. 100; 64 T.L.R. 82; [1948] 1 All E.R. 56.

[LORD GODDARD C.J. We decided in *In re Eaves* [18] that that was not the law, and that the parties are husband and wife from the date of the marriage until the date of the decree of nullity. I have never understood why the judgment in the Divorce Court remains in the old form. It is most misleading.]

In re Eaves [18] was referred to in *In re Dewhirst*, *Flowers* v. *Dewhirst*,[19] where Harman J. held that a widow who had remarried, but who subsequently obtained a decree of nullity on the grounds of impotence, had retained her status as a widow for the purposes of her deceased husband's estate.

[LORD GODDARD C.J. That was the converse of the *Eaves* case.[20]]

It was held in *Newbould* v. *Attorney-General* [21] that a decree of nullity granted on the ground of impotence had retrospective operation so that there was in fact no marriage. If that were not the true position it would have been unnecessary to make provision in the Matrimonial Causes Acts for the legitimation of the children of a voidable marriage which has been annulled: see Matrimonial Causes Act, 1950, s. 9. That section would have been unnecessary if such a child had in fact been legitimate at birth. In *Dodworth* v. *Dale* [22] Lawrence J. decided that where a decree of nullity has been granted in the case of a voidable marriage the marriage becomes null and void, but not for all purposes. The question for the court is whether competence to give evidence at a trial, after a decree has been granted, in respect of forgeries which took place during the period of the supposed marriage is a purpose for which the marriage is not null and void. In *Dodworth* v. *Dale* [22] Lawrence J. was concerned with a claim by the Crown for income tax after a decree of nullity had been pronounced in a voidable marriage. The Crown thought it right to argue that as there had never been a marriage the respondent was not entitled to relief in respect of a wife's allowances. Lawrence J. in the course of his judgment said words to the effect that transactions concluded and things done before the decree could not be reopened or undone, but it is submitted that Lawrence J., who came to that conclusion after reviewing previous judicial decisions, meant transactions concluded and things done in the belief that the marriage was subsisting, e.g., marriage settlements or claims for income tax relief.

---

[18] [1940] Ch. 109.

[19] [1948] Ch. 198; 64 T.L.R. 74; [1948] 1 All E.R. 147.

[20] [1940] Ch. 109.

[21] [1931] P. 75; 47 T.L.R. 297.

[22] [1936] 2 K.B. 503; 52 T.L.R. 512; [1936] 2 All E.R. 440.

In the present case all that happened was that the appellant forged the name of a woman who was entitled to obtain a decree of nullity against him and who subsequently did so. Therefore as the marriage was null and void retrospectively from the date of the decree absolute there was no reason why the evidence should not have been admitted. *De Reneville* v. *De Reneville*[23] was concerned with the question of domicile in nullity actions and has no bearing on this case.

Buzzard replied.

Cur. adv. vult.

November 16. LORD GODDARD C.J. The judgment which I am about to pronounce is the judgment of the court.

The question for decision in this appeal is whether a spouse who has been lawfully married but has subsequently obtained a decree of nullity on the ground of the impotence of the other can give evidence against that other on his or her trial for alleged criminal offences committed during the coverture. There has been hitherto, so far as we are aware, no decision on the subject; the point was not taken at the trial of the appellant, nor was it raised in his notice of appeal. He sought leave to appeal on grounds which had no substance, but the court, on perusing the papers, saw that the question arose and gave leave to appeal so as to have it argued and determined. Mr. Buzzard, who was not counsel below, undertook the case for the appellant at the request of the court, and we are indebted to him for a careful and learned argument in which all the relevant authorities have been brought to our notice.

[His Lordship stated the facts and continued:] The wife had petitioned for, and had obtained, a decree of nullity on March 21, 1950. As is well known, at least to lawyers, the judgment, or to use the old expression of the ecclesiastical courts, the sentence in such cases declares that the petitioner is and always

---

[23] [1948] P. 100.

C. C. A.
1953

REG.
v.
ALGAR.

has been free of the bonds of matrimony. The prosecution, taking the view that this was equivalent to a judgment that the petitioner never had been the wife of the appellant, accordingly called her as a witness for the prosecution. Mr. Maxwell Turner, who has appeared for the Director on this appeal, admitted, in our opinion rightly, that had there been a decree of divorce she would have been incompetent as a witness, but he contended that the position was different where the decree was one of nullity which in terms related back so that she was never married. In view of this admission, in strictness it is only necessary to consider whether there is any difference between the legal effect of a decree of divorce and a decree of nullity as affecting the competence of the wife as a witness, but the case having never before arisen is of importance, and as decrees of divorce and nullity are far more frequent than in former days we think it advisable briefly to review the law on the subject. Moreover, as this is, I think, the third case which has recently come before this court where a wife has been called against her husband we think that it may be as well to state the law of competency both in what we may call the ordinary case as well as cases where divorce or nullity come into question.

At common law one spouse could not give evidence against the other except in the case of offences against the person or liberty of the other party to the marriage. In such cases a spouse is both competent and compellable. There have been a considerable number of modern statutory exceptions to this rule which allow a wife to be a competent but not a compellable witness. The Criminal Evidence Act, 1898, s. 4 [and the Schedule thereto], deals with some of these cases, but not exhaustively. We need not set them out in detail. Suffice it to say that they are mostly offences against children and young persons and sexual offences. In cases permitted by sections 12 and 16 of the Married Women's Property Act, 1882, which give spouses the right to bring criminal proceedings for the protection of their property, it has been placed beyond doubt by the Married Women's Property Act, 1884, that in such cases the spouses are both competent and compellable. Cases in which spouses can be admitted but not compelled to give evidence against the other are set out in Halsbury's Laws of England, Hailsham ed., vol. 9, pp. 218, 219. Quite modern instances since the Criminal Evidence Act, 1898, are prosecutions for bigamy (Administration of Justice Act, 1914), and the Infant Life (Preservation) Act, 1929. The present case comes within none of the categories. There may

Lord Audley.

C. C. A.
1953

REG.
v.
ALGAR.

be cases of forgery in which a spouse could give evidence against the other if the case could be brought within the sections of the Married Women's Property Act, 1882, referred to above, but we need not consider them as it was the bank that was defrauded in this case.

It should be remembered that the three statutes passed in the middle of last century to reform the law of evidence affected only civil proceedings. The Evidence Act, 1843, removed the disqualification of a witness on account of interest or infamy; the Act of 1851 removed the incompetence of the parties themselves, and the reform was completed by the Act of 1853, which allowed the spouses of the parties to give evidence. None of those statutes applied to criminal cases. So we now have to inquire whether the incompetency in a criminal case extended beyond the actual period of coverture. *Monroe* v. *Twisleton*,[1] a case approved again and again, lays down in terms that a divorced wife cannot be called to testify against her husband in respect of any matters arising or conversations which had passed during the marriage. The same rule was applied in the case of a widow: *Doker* v. *Hasler*.[2] Both of those cases were decided at nisi prius, the first by Alvanley C.J., the second by Best C.J., afterwards Lord Wynford. They were approved by the Court of Common Pleas in *O'Connor* v. *Marjoribanks*,[3] where the incompetence was extended to the widow's personal representatives. The reason for the rule was stated in that case both by Tindal C.J. and Maule J. to be the necessity of preserving the confidence of the conjugal relation, and this reason for the rule has been stated in much the same terms by other judges of eminence. In *O'Connor's* case[3] Maule J. said[4]: "A rule may be a very good "rule, though the reason on which it is founded may not be "applicable to every case which is governed by the rule." As Lord Sumner once observed in *Jones* v. *Jones*[5]: "principles are "like that."

All those cases were cited without criticism or dissent by the Court of Appeal as recently as *Shenton* v. *Tyler*.[6] Those decisions were all before the three statutes to which we have just referred, and we need not stay to inquire what effect they had on the doctrines laid down so far as civil proceedings are concerned. This was much discussed in *Shenton* v. *Tyler*,[6] but those Acts have no application to criminal law. In a criminal case, therefore, subject to the common law and modern statutory exceptions mentioned above, a spouse remains incompetent to give evidence against the other, and the incompetence continues after divorce in respect of matters which arose during the coverture.

---

[1] (1802) Peake Add.Cas. 219.

[2] Ry. & M. 198.

[3] (1842) 4 Man. & G. 435.

[4] Ibid. 445.

[5] [1916] 2 A.C. 481, 500; 32 T.L.R. 705.

[6] [1939] Ch. 620.

We have now to consider whether the same incompetency attaches after a decree of nullity. In our opinion this depends solely on whether the marriage annulled was void or merely voidable. A marriage is void where there is bigamy, consanguinity, non-age or where it has been celebrated contrary to the requirements of the law now collected and enacted in sections 25 to 49 of the Marriage Act, 1949. In those cases the court will regard the marriage as never having taken place and no status of matrimony as ever having been conferred. Consequently, the parties never having been husband and wife either is competent to be called against the other: *Wells* v. *Fisher.*[7] The expression to be found in some of the textbooks and cases "de "facto marriage" or "de facto wife" means, in our opinion, no more than that, while the parties may have appeared to be, and even have believed that they were, husband and wife, they were not, either because there was an impediment which prevented their marriage or because the marriage was not celebrated according to law. We say nothing about the absence of true consent, as it is possible that at least for certain purposes other questions not material to this case might arise.

But impotence only makes a marriage voidable. Until it has been avoided at the suit of the aggrieved party it will be regarded by every court as valid and subsisting. The parties are husband and wife till a decree has been pronounced, and if one party dies before one was, or without one being, obtained the other is the widow or widower of the deceased. The reason why the decree is in the form which declares that the petitioner is and always has been free of the bonds of matrimony is, if I may be permitted to quote a judgment of my own, in *In re Eaves*,[8] that the old sentence of the ecclesiastical courts following the canon law has been preserved, but in truth neither the petitioner nor the respondent has always been free. The petitioner has always been in the position to obtain freedom, but until the decree the tie remains binding. Since the decision of the Court of Appeal in that case, in *Adams* v. *Adams*,[9] and *De Reneville* v. *De Reneville*,[10] it is, we think, settled that the courts now regard the parties to a voidable marriage before decree to be for all purposes truly husband and wife. Unless there is a decree they will live and die as married persons with all the incidents that attach to that estate. We think it clear that the reason for the incompetency applies to these persons with force at least equal to the case of divorced persons. It would be artificial in the highest degree to apply a different rule in the two cases. It is with no disrespect that one can say that what is artificial is the old form of sentence in these cases, which in truth perpetuates a canonical fiction.

---

[7] (1831) 1 M. & Rob. 99.

[8] [1940] Ch. 109.

[9] [1941] 1 K.B. 536.

[10] [1948] P. 100.

The result is that the evidence of the appellant's former wife was inadmissible, and as it dealt with a vital point in the case we cannot apply the proviso. Accordingly the conviction must be quashed.

Conviction quashed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

1953
Nov. 2.
Devlin J.

BOWSKILL *v.* DAWSON AND ANOTHER.
NATIONAL PROVINCIAL BANK LD. *v.* DAWSON AND ANOTHER.

[1951 B. 1029.]

Evidence — Admissibility — Motor-car — Collision — Written statement signed by plaintiff shortly after the accident—Copy made by police sergeant—Original lost—Death of plaintiff before trial of his action for damages—Copy inadmissible in evidence—Evidence Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1 (1) (2) *and* (3).

By section 1 (1) of the Evidence Act, 1938: "In any civil "proceedings where direct oral evidence of a fact would be admis- "sible, any statement made by a person in a document and tending "to establish that fact shall, on production of the original "document, be admissible as evidence of that fact. . . ."

Subsection (2) provides: "In any civil proceedings, the court "may . . . , if having regard to all the circumstances of the case "it is satisfied that undue delay or expense would otherwise be "caused, order that such a statement as is mentioned in subsec- "tion (1) of this section shall be admissible as evidence . . . "(*b*) notwithstanding that the original document is not produced, "if in lieu thereof there is produced a copy of the original document "... certified to be a true copy. . . ."

Shortly after a collision had occurred between a motor-car driven by the plaintiff and another vehicle, the plaintiff signed a written statement; and on the next day a police sergeant made a typewritten copy of his statement. At the hearing of the plaintiff's action for damages against the other driver it was sought to tender the copy statement in evidence since the original had been lost and the plaintiff had died:—

Held, that the copy was inadmissible in evidence as section 1 (1) of the Act of 1938 in terms excluded the ordinary common law rules regarding secondary evidence of a lost document, and subsection (2) concerned the production of certified copies in cases where the original documents were in existence but unnecessary delay and expense would be caused by producing them.

Held, also, that the copy was inadmissible by virtue of subsection (3) as the plaintiff was an interested person, and at the time of making the statement must have anticipated that proceedings would be taken.

Action.

A collision occurred between a motor-car which was driven by the plaintiff, Dr. Ernest William Bowskill, and a motor-cycle. The motor-car also ran into the rear of a stationary lorry. Shortly after the collision, in which the motor-cyclist was killed, the plaintiff made a statement which was taken down in writing by a police inspector and signed by the plaintiff. On the next day a police sergeant made a typewritten copy of the statement.

The plaintiff brought this action against the defendants, the administrators of the deceased motor-cyclist's estate, claiming damages for the loss and expense which he alleged was caused by the motor-cyclist's negligence; and the defendants counterclaimed for damages under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. The plaintiff died shortly before the hearing of the action, and counsel on his behalf sought to tender in evidence by virtue of section 1 of the Evidence Act, 1938, the copy of the statement as the original had been lost. That was objected to by counsel appearing for the defendants on the ground that such evidence was inadmissible under the terms of section 1 of the Act of 1938.

R. Marven Everett Q.C. and *H. Tudor Evans* for the plaintiff.

W. A. Fearnley-Whittingstall Q.C. and *P. M. O'Connor* for the defendants.

Devlin J. (after stating the facts): It is clear that the only way in which this document could become evidence is by virtue of the Evidence Act, 1938. [His Lordship read section 1 (1) of that Act, and continued:] The subsection states "production "of the original document." In my judgment, these words, if they stood alone, would be sufficient to exclude the ordinary common law rule of evidence which admits secondary evidence of a lost document. What has been proved in this case is that the original statement which was taken down by Inspector King and signed by the plaintiff has been lost, and that is why the copy has been tendered. It cannot be done merely by the common law rule as to secondary evidence of lost documents. I think that the words of the statute, "on production of the original "document," mean that the original document itself must be produced. The Act is doing something which makes admissible a document which would not at common law be admissible, and therefore its provisions must be strictly followed. The only qualification, therefore, to the words "original document" that can be introduced must be found, not in the common law, but from the Act itself.

[His Lordship read subsection (2) of section 1, and continued:] Mr. Fearnley-Whittingstall argued that subsection (2) was not applicable in this case. The condition which is required to be satisfied before a copy can be produced is that the court should, having regard to all the circumstances of the case, be satisfied that undue delay or expense would otherwise be caused. It is not therefore a proviso which is designed to be some substitution for the common law rule as to secondary evidence of lost documents; it requires the court to be satisfied that undue delay or expense would otherwise be caused, and therefore implicitly requires that the original document should be in existence, and the only question that arises is whether it will not cause an unnecessary delay or expense to have it produced. That is borne out by what follows in the rest of the section. It is something certified to be a true copy. It looks as if the statute had in mind the very common arrangement that where there are original documents which are kept in somebody's custody, such as a bank or a public authority, and it is inconvenient to have them brought to court, a certified copy is accepted instead.

I am bound to say that I think that this is not an altogether satisfactory ground, from the common sense point of view, for excluding documents. I have no reason to doubt that the copy in this case is an accurate copy and of just as much value as the original would have been. However, I think that an Act of this sort must be carefully followed and applied, and in my judgment the Act does not allow the admission of a copy which is produced in the way in which this one has been produced in substitution for a lost document.

1953

Bowskill v. Dawson.

Devlin J.

That really concludes the matter, but I think that it is desirable that I should also express my view on the second point. That turns on the well-known provision of section 1 (3), namely: "Nothing in this section shall render admissible as "evidence any statement made by a person interested at a time "when proceedings were pending or anticipated involving a "dispute as to any fact which the statement might tend to "establish." Subsection (5) permits the court to draw any reasonable inference from the form or contents of the document in which the statement is contained. Accordingly, with Mr. Fearnley-Whittingstall's consent, I have looked at the document which the plaintiff's counsel desires to be put in as the statement of Dr. Bowskill. I am satisfied that, quite apart from the fact that Dr. Bowskill admittedly knew that the motor-cyclist was killed and, therefore, that there would be an inquest, it is a case in which a person in Dr. Bowskill's position would have been likely to anticipate that proceedings would result; and it is plain, I think, that he was personally interested. He was the driver and the owner of the car. Of course, nobody knows for certain that proceedings will result because of a road collision—there might be a knock for knock agreement, or something of that sort. But, subject to that, it seems to me to be obvious, in the circumstances of the case where a stationary lorry was run into from behind and had its rear light damaged, that the owner of the lorry would require to be indemnified by the owner of the car which had driven into it.

It is plain from the nature of the statement at which I have looked that one of the things which Dr. Bowskill was naturally concerned to do was to explain how it came about that, without his fault, he drove into the back of the stationary lorry. I think that that is sufficient to satisfy me that he anticipated that proceedings would result, unless, of course, he gave a satisfactory explanation which the lorry driver accepted and proceedings were diverted against someone else. I think that the case also falls within subsection (3).

Accordingly, for these reasons, I exclude the statement.

Statement excluded.

Solicitors: *E. P. Rugg & Co.; William Easton & Sons.*

S. C.

C. A.

1953
Oct. 23, 26,
27, 28.

Evershed M.R.,
Jenkins and
Morris L.JJ.

CULLINANE *v.* BRITISH "REMA" MANUFACTURING CO. LD.

[1951 C. No. 4851.]

Sale of Goods—Warranty as to performance of plant sold—Breach—Capital loss—Loss of profit—Measure of damages—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 53.

The plaintiff purchased a clay pulverizing plant from the defendants, the defendants warranting that the plant would be able to process the plaintiff's clay at the rate of six tons per hour. The plant was made according to specification and was duly delivered, but it failed to pulverize the clay at the warranted rate. The plaintiff claimed damages for the capital expended in installing the plant, with interest, making allowance for the unpaid balance of the purchase price and the residual value of the plant and ancillary equipment. He also claimed for the loss of profit, deducting from his estimated gross receipts at the warranted output, running costs, interest on capital, depreciation and maintenance. The loss of profits was claimed as from the date of installation until the date of trial, approximately three years. The estimated useful life of the machine was, however, ten years. The official referee awarded £7,370 damages for capital thrown away, plus interest and £8,913 loss of profit:—

Held (*per* Evershed M.R. and Jenkins L.J.), that the damages awarded were excessive and should be reduced. The measure of damages was the cost of putting the plaintiff in the same position (so far as money could do that) as he would have been in if the warranty had been fulfilled. He could claim either capital loss due to the breach of warranty or, as the plant was to the knowledge of the defendants required to perform the particular function to which the warranty related, he could claim the business loss which must reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as being the probable result of the breach. These two claims were alternative. The plaintiff had chosen to limit his claim for loss of profit to three years, but that did not entitle him to claim for the capital loss in addition, as he, admittedly, could not have claimed both if he had not placed any limitation on the profit. He had made allowance for depreciation, but in so far as his claim was based on loss of profit, depreciation was irrelevant. The capital loss should be deducted from the total awarded, and the loss of profit should be calculated up to the date of the judgment in the action, that being the period claimed, without any deduction for interest.

Hadley v. *Baxendale* (1854) 9 Exch. 341 applied.

Per Morris L.J. dissenting, the plaintiff is entitled to the capital loss suffered and, in addition, to the net profit which he would have earned over the three years to which his claim was limited, less an amount representing the appropriate allocation which would have been made year by year so as to wipe out the purchase price of the plant over the estimated life.

APPEAL from an official referee (J. D. Casswell Q.C.).

In 1947, the plaintiff agreed to buy from the defendants a pulverizing and drying plant to be made according to a detailed specification, the defendants warranting that the plant would be capable of pulverizing the plaintiff's clay at the rate of six tons per hour. The price of the plant was agreed, but provision was made for adjusting the price to take account of changes in prices between the date of the quotation and the delivery date. The eventual purchase price was £6,578. The plant was duly delivered about April 1, 1950. It was made according to the specification but, despite repeated visits by the defendants to adjust it, it did not satisfy the warranty. Instead of pulverizing clay at the rate of six tons per hour, it could only handle two tons per hour and was, therefore, commercially useless to the plaintiff. The plaintiff, who had built special housing for the machine and had purchased ancillary plant at considerable expense, kept the machine and used it, but he sued for damages due to the breach of warranty by the defendants. Particulars of the damages claimed were set out under five lettered heads and were as follows:

appeal allowed

Particulars of Damage.

A. Cost of buildings erected and work done by the plaintiff to house, support, accommodate, and generally be ancillary to the plant supplied by the defendants.

	£	s.	d.	£	s.	d.
Total cost	4,559	1	5			
Subtract estimated break-up value of buildings ...	2,000	0	0			
				£2,559	1	5
B. Cost of plant supplied by the defendants	6,578	0	0			
Subtract estimated residual value of the plant	3,289	0	0			
				£3,289	0	0
C. Cost of associated and ancillary plant and charges— (Items) Total	3,343	0	0			
Subtract estimated residual value of the plant	1,671	0	0			
				£1,672	0	0

C. A.
1953

CULLINANE
v.
BRITISH
"REMA"
MANUFACTURING
CO. LD.

	£	s.	d.	£	s.	d.
D. Interest on capital at 4 per cent. from April 1, 1950, to December 15, 1951 (and continuing until settlement of claim for damages)—						
A.	4,559	0	0			
B.	6,578	0	0			
C.	3,343	0	0			
	£14,480	0	0			
Subtract interest at 4 per cent. for the same period on the balance of the purchase price	1,078	0	0			
	£13,402	0	0			
On which interest is				£915	16	0
E. Loss of profit.						
(A) Per annum.						
Receipts from warranted output of six tons per hour on a 47-hour week: 14,664 tons per annum at £1 17s. 6d. per ton				27,495	0	0
Subtract						
Depreciation at 10 per cent. and maintenance at 5 per cent. on plant and buildings (on £14,480)	2,172	0	0			
Running costs	6,433	2	10			
Office expenses	1,030	0	0			
Interest on capital	579	4	0			
				£10,214	6	10
Estimated net profit per annum ...				£17,280	13	2
(B) From April 1, 1950, to December 15, 1951, and continuing				£29,521	2	6
Total of A, B, C, D and E				£37,956	19	11
Subtract balance of the purchase price of the plant outstanding and due from the plaintiff to the defendants				1,078	0	0
				£36,878	19	11

C. A.
1953

CULLINANE
v.
BRITISH
"REMA"
MANUFACTURING
CO. LD.

The defendants asked for particulars of the words "'and "'continuing' under head E (B), stating precisely what period "is referred to and the amount of loss of profit (if any) claimed "in respect of such period." The plaintiffs replied "'and con-"'tinuing' is the period from December 15, 1951, to the date "of trial of this action."

The total claim, therefore, to December 15, 1951, with a deduction made from the total set out above of the unpaid balance of the purchase price (£1,078) was £36,878 19s. 11d. The official referee accepted the plaintiff's figures under heads A and B, but reduced the claim under C from £1,672 to £1,522. The total awarded under heads A, B and C, as representing the capital thrown away as the result of the breach of warranty, was £7,370 1s. 5d. Under head D he awarded the interest on the capital on the basis of the period of three years from April 1, 1950, to April 1, 1953, when he delivered his judgment. That amount with a contra entry for the interest on the balance of the purchase price (£1,078), which remained to be paid, he fixed at £1,608 4s. 9d. Finally he awarded £8,913 1s. for loss of profit under head E, limiting the period to three years, deducting interest but making no deduction for depreciation. The total award, taking account of the unpaid balance of the purchase price, for which the defendants counterclaimed, was, therefore, £16,813 7s. 2d.

The defendants appealed.

Roy Wilson Q.C., *Megaw Q.C.* and *M. B. Summerskill* for the defendants. A large part of the sum awarded to the plaintiff by the official referee related to the loss of profits attributable to the breach of warranty. This sum was awarded in addition to damages for the loss of capital expenditure. Even if, applying the principle in *Hadley* v. *Baxendale*,[1] as expounded by Asquith L.J. in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries Ld.*,[2] the plaintiff is entitled to loss of profits which must reasonably be supposed to have been in the contemplation of both parties at the time when they made the contract, as being the probable result of a breach of the warranty, he cannot in addition claim for the damages which arise naturally from the breach of the warranty under the first head in *Hadley* v. *Baxendale*.[3] [*Cory*

---

[1] (1854) 9 Exch. 341.

[2] [1949] 2 K.B. 528, 539; 65 T.L.R. 274, 276; [1949] 1 All E.R. 997, 1002.

[3] 9 Exch. 341.

v. *Thames Ironworks and Shipbuilding Co. Ld.*[4] was referred to.] If damages are recoverable for the loss of profits which it is reasonable to suppose that the plaintiff would have earned if the plant had worked as warranted, he should not be awarded anything in respect of the capital expenditure necessary to make the profits. Either the whole of the damages for the loss of capital expenditure (represented by the difference between the cost price of the plant with the ancillary equipment and its residual value) should be disallowed or, alternatively, though the result is the same, damages for loss of profit should be awarded only in so far as they exceed the capital loss. Depreciation on both sides can then be ignored.

In estimating the loss of profits regard must be had to the commercial life of the machine, that is, to the period during which it is commercially profitable to continue operating this machine, as distinct from the technical or mechanical life. The plaintiff by his particulars claimed the loss of profit over a period which, in the events which have happened, is approximately three years. That limitation was not a concession by him entitling him to a sum in respect of the capital expenditure over and above the loss of profits during that period; it was probably his estimate of the commercial life of the machine, for he admitted that it would be pure guesswork to attempt to estimate the profits further into the future. The finding of the official referee is on the basis of that estimated life of three years and it is not open to the plaintiff to claim now that he would have made profits for a longer period. The official referee found that at the end of the period the machine would have had only a scrap value to the plaintiff; so that, on those findings, at the end of the three years the plaintiff having spent about £16,000 would have received about £9,000 profit if the contract had been performed, and he would be left with plant and machinery having a residual value of only £7,370. The contract has not been performed, and he is entitled to the estimated lost profit; but as the value of the plant at the end of the three-year period is the same whether the contract was performed or not, he cannot claim anything in respect of that. The onus of proving that the value of the plant would have exceeded the scrap value at the end of the three-year period if the contract had been performed was on the plaintiff, but he did not produce any evidence to that effect.

In estimating the profits which would be earned, the proper basis is to take all risks into account, and to estimate the commercial life of the machine in this plaintiff's hands, as a beginner in the market competing with experienced competitors. It is submitted that that is what the official referee has done here.

---

[4] (1868) L.R. 3 Q.B. 181.

Raeburn Q.C. and *E. V. Falk* for the plaintiff. The plaintiff has not conceded by implication or otherwise that the life of the machine was limited to three years, nor did the official referee so find. The limitation to the date of trial (approximately three years) was made on the basis of the claim as a whole, that is, that the plaintiff was entitled to the capital loss, with interest, and also to his prospective profits for those three years. The prospective profits were to be calculated on the basis of the average annual earnings, less depreciation averaged over the expected life of the machine, that is, 10 years. If the plaintiff had asked for the profit to be calculated over 10 years instead of over three, the deduction which he made for depreciation would have exactly equalled the capital loss, so that he would not have received damages both for loss of profits and capital loss. Instead, he was content to take the period up to the date of trial, because over that period a realistic figure could be estimated, and he based his claim on a full working week for 52 weeks in each year. The official referee found, however, that the profits must be calculated on a much more limited working period within the three year period, and on that basis depreciation would be negligible; that was why he wrote off the depreciation. He found that if the machine had been as warranted it would after that period of work have been practically as good as new and would have been good for at least seven years more. The official referee did not include in his estimate, either directly or indirectly, anything in respect of the probable earnings after the date of trial, but the plaintiff did not concede that the profits were likely to drop after the three years had ended, nor, indeed, that they would not continue to increase on the upward scale estimated by the referee during that period.

The proper measure of damages is not that the plaintiff should be put back where he would have been if the contract had not been made. It is necessary to work out what he would have had if the contract had been fulfilled, and then to put him in that position, in so far as money can do that. The plaintiff has claimed loss of profits till the date of the trial and, in addition, he is entitled to the difference between the cost price of the machine and the value of the machine at the end of the period for which the loss of profits is calculated, because, if the warranty had been fulfilled, he would, at the end of that period, have had a machine as good as new. As things stand, however, the machine and ancillary plant have only a scrap value.

The second limb of the statement of principle by Asquith L.J. in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries* [5] is not alternative to the first. If both parties know that a special loss will attach to a breach of warranty the damage so flowing will be additional to the loss under the first limb. The commonsense test is, what has the plaintiff suffered as a result of the breach of warranty? His loss can be looked at either as a general loss, or it can be divided under the two heads of capital loss (including both what the plaintiff has lost on the machine itself and as a result of having to purchase housing and ancillary plant which are specific to this machine and have no commercial value if the plant is not as warranted) and loss of profit. Or the lost profits, in so far as they can be estimated, can be awarded, together with something for the future loss of profits which it is reasonable to suppose would have been earned after the period during which they can be realistically assessed. The capital loss can be regarded as representing a fair attempt to quantify that loss.

It is submitted that the sum awarded in respect of the loss of profits ought not to be reduced by any deduction being made for depreciation.

By his cross-appeal the plaintiff asks that the period "to the "date of trial," which was taken as the basis for estimating the loss of profits, ought to be extended to the date on which the Court of Appeal gives judgment.

Wilson Q.C. in reply. The submission by the plaintiff that he can claim for the difference in value at the end of the three year period between the machine as it then was, and as it had been warranted, depends for its validity on a finding that, on the basis of the work done during the three years, the machine would have been as good as new, but that is not borne out by the evidence. Further, as the plaintiff admitted, it is impossible to assess the profits beyond the three year period, and that is a strong indication that the plaintiff regarded the life of the machine beyond that period as purely conjectural: see *B. Sunley & Co. Ld.* v. *Cunard White Star Ld.*[6]

The correct basis on which to assess the damages is to award the gross profits, deducting the capital expenditure necessary to earn those profits, less the estimated break-up value of the machine at the end of the three year period.

---

[5] [1949] 2 K.B. 528, 539.

[6] [1939] 2 K.B. 791; [1939] 3 All E.R. 641.

[EVERSHED M.R. If, for example, a man buys a cow warranted to produce four gallons of milk per day but it is found that she can only produce one gallon per day, the damages to which the purchaser is entitled can be either the difference between the value of the "one-gallon-per-day" cow which he has got and the value of a "four-gallon-per-day" cow, or estimated by reference to the loss of profits which the purchaser might have earned if the cow had been as warranted, assuming that he keeps the cow. Depreciation of the cow does not come into the second calculation. If the claim is limited to a period of three years, that does not entitle the purchaser to combine the two methods, but there does not, on the other hand, seem to be any justification for deducting anything for depreciation if the second method is adopted.]

If the damages are estimated by the second method, an award of the gross earnings for the whole period does not reflect a true picture of the position in which the purchaser would have been if the warranty had been fulfilled. Something for depreciation over the period for which earnings are calculated must be made.

EVERSHED M.R. This appeal relates only to the proper measure of the damages which flow from what has been found to be a breach of warranty in regard to certain plant manufactured by the defendants and supplied to the plaintiff. The nature of the plant and of the warranty alleged and found to have been broken is sufficiently stated in the statement of claim as amended thus: "(1) By a contract made in the year 1947 "the defendants agreed to sell to the plaintiff and the plaintiff "agreed to purchase a pulverizing and drying plant at a price "of £5,460 the defendants reserving the right to make an "additional charge if their costs were increased from date of "quotation to date of despatch as a result of which an additional "charge was in fact made of £1,118. . . . By the said contract "the defendants expressly or alternatively impliedly warranted "and agreed that the said plant should be capable of handling "the plaintiff's clay known as Wareham Ball clay containing up "to 20 per cent. to 22 per cent. moisture, the said clay to be "cut, dried and ground so as to produce a dry clay powder "containing approximately 2 per cent. final moisture at the rate "of six tons per hour." The plant was delivered about April 1, 1950.

It is, in my judgment, extremely important to have clearly in mind the nature of the contract and particularly of the warranty. The plant, I understand, was built according to a detailed specification, and there is no doubt that the plant as supplied conformed strictly with the specification. Unfortunately, however, as the official referee found, the plant did not satisfy the warranty, because it was incapable of producing dry clay powder at the requisite speed. The gist of the warranty lies in the last few words, which I read, "at the rate of six tons per "hour." The machine was capable of handling the plaintiff's clay and of cutting, drying and grinding it so as to produce a dry clay powder, but not at the rate of six tons per hour. The productive capacity turned out to be at a considerably less rate, and I understand that the difference in rate, commercially speaking, was the difference between a profitable and an unprofitable commercial venture.

The plaintiff, in his statement of claim, further particularized the damage which he alleged he had suffered. [His Lordship referred to the particulars of damage set out above and continued:] It is, I think, obvious that damages of approximately £37,000 was a very large sum to claim for plant for which the purchase price was about £6,000 and which was to be used in an enterprise which seems (from my reading of the official referee's judgment) to have been of a somewhat speculative character. The total amount awarded was considerably less, namely, £16,813 odd. That reduction is attributable entirely, or almost entirely, to a reduction of the sum awarded for loss of profit. [His Lordship referred to the particulars of the award, and continued:] The argument in this court of the defendants has been that the award really involves giving damages twice over to the plaintiff. The machine was made precisely according to the specification. It was delivered and is now in the plaintiff's possession and it is working, though it does not perform its productive function in the way that was warranted. The principle upon which damages for breach of contract are awarded has been stated many times and was carefully considered by Asquith L.J. in delivering the judgment of this court in *Victoria Laundry (Windsor) Ld.* v. *Newman Industries.*[1] The court has read passages from that judgment which are expository of the original principle laid down in *Hadley* v. *Baxendale*,[2] and it

---

[1] [1949] 2 K.B. 528, 539; 65 T.L.R. 274, 276; [1949] 1 All E.R. 997, 1002.

[2] (1854) 9 Exch. 341.

C. A.

1953

CULLINANE
v.
BRITISH
"REMA"
MANUFACTURING
CO. LD.

Evershed M.R

will, I think, suffice to quote the passage from *Hadley* v. *Baxendale* [3] which forms the text, so to speak, of Asquith L.J.'s later exposition: "Where two parties have made a contract which one "of them has broken, the damages which the other party ought "to receive in respect of such breach of contract should be such "as may fairly and reasonably be considered either arising "naturally, that is according to the usual course of things, from "such breach of contract itself, or such as may reasonably be "supposed to have been in the contemplation of both parties, at "the time they made the contract, as the probable result of the "breach of it."

In the present case it is plain that to the knowledge of the defendants this machine was required to perform a particular function, and the warranty given shows what the function was that the machine was designed to perform. There is, therefore, no doubt at all that the plaintiff is entitled to rely on the second part of the passage I have read, and to claim as damages the business loss which must reasonably be supposed to have been, in the contemplation of both parties at the time when they made the contract, the probable result of the breach. In other words, this plaintiff is not confined to the loss which might be called the natural result of having a machine which turned out to be worth less than the purchase price he has paid for it.

Reference was made to the Sale of Goods Act, 1893; but that Act, which put into statutory form long established principles, does not for present purposes, to my mind, add anything to what I have already stated based on my citation from *Hadley* v. *Baxendale*.[4] But it is perhaps right to note that section 53 of the Sale of Goods Act, 1893, is directed particularly to the remedy for breach of warranty. Subsection (2) provides: "The "measure of damages for breach of warranty is the estimated "loss directly and naturally resulting, in the ordinary course of "events, from the breach of warranty." Subsection (3) provides: "In the case of breach of warranty of quality such loss "is prima facie the difference between the value of the goods at "the time of delivery to the buyer and the value they would "have had if they answered to the warranty." Those two subsections do not, I think, assist, or qualify the general statement applicable here, that the plaintiff, who got a machine which in the event failed to live up to the performance warranted, should be put in the same position (so far as that can be done by

[3] 9 Exch. 354.

[4] 9 Exch. 341.

C. A.
1953

Cullinane
v.
British
"Rema"
Manufacturing
Co. Ld.

Evershed M.R.

money) as he would have been in if the machine had been as warranted.

I have read the material part of the statement of claim, and it is plain from the case as pleaded that the plaintiff was alleging entitlement to the total capital loss he had suffered by having laid out, approximately, £14,000 and then finding himself with material which was only worth £7,000, also to the loss of the profit which this machine, if it had been as warranted, would have brought him during its mechanical life. It is fair to say that in making his computation of damages for loss of profit, he did deduct from each annual sum a figure of 10 per cent. of the total original capital outlay in respect of depreciation.

It appears from the finding of the official referee that the useful life of the machine was ten years—that is to say, it would have continued to perform its mechanical functions for a period of ten years: so that if there had been clay to grind and markets in which the ground clay could have been sold it would have brought emoluments to the plaintiff for that period. I base that statement on the passage of the judgment where the official referee said: "If the plant had been as warranted Mr. Davies "gave its probable life as ten years. I find that it was within "the contemplation of the defendants that this plant would be "used, not as a museum piece but as a means for making a "profit by the sale of its products. If the plant had been as "warranted the plaintiff's intention was to use it for its life, or "for so long as it could provide profit. At the end of that time "it would be useless."

It seems to me, as a matter of principle, that the full claim of damages in the form in which it is pleaded was not sustainable, in so far as the plaintiff sought to recover both the whole of his original capital loss and also the whole of the profit which he would have made. I think that that is really a self-evident proposition, because a claim for loss of profits could only be founded upon the footing that the capital expenditure had been incurred. As I have said, however, there was a deduction made in respect of depreciation at 10 per cent.; and if the estimated life of the plant is taken as ten years it follows that, during the period of ten years, while profits must be assumed to have been earned, the whole of the capital cost would have been written off. In other words, if the estimation of damages under head (E) had been carried on for the whole period of ten years, the sum total under heads (A), (B) and (C), having been elaborately worked out, would have all been deducted again in the course of calculating (E).

As a matter of principle also, it seems to me that a person who has obtained a machine, such as the plaintiff obtained, being a machine which was mechanically in exact accordance with the order given but which was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may say, when he discovers its incapacity, that it was not what he wanted, that it is quite useless to him, and he may claim to recover the capital cost he has incurred, deducting anything he can obtain by disposing of the material that he got. A claim of that kind puts the plaintiff in the same position as though he had never made the contract at all. In other words, he is back where he started; and, if it were shown that the profit-earning capacity was in fact very small, the plaintiff would probably elect so to base his claim. But, alternatively, where the warranty in question relates to performance, he may, in my judgment, make his claim on the basis of the profit which he has lost because the machine as delivered fell short in its performance of that which it was warranted to do. If he chooses to base his claim on that footing, it seems to me that depreciation has nothing whatever to do with it.

During the course of the argument many analogies were taken, and I find some assistance from the simple agricultural analogy of the cow. If, for example, A sells to B a heifer for £100, and warrants that for the next five lactations she will produce milk at the rate of four gallons a day, but it is discovered that the cow's performance is not at the rate of four gallons a day but is only one gallon a day, and if a one-gallon-a-day cow is worth not £100 but £10, then the buyer might elect to follow one of two courses. He could claim to recover the difference between the £100 which he had paid for a four-gallon-a-day heifer and £10, the true value of the one-gallon-a-day heifer, and he could recover the difference, £90. That would put him in the position in which he would have been if he had bought, and intended to buy, the cow which in fact he got. Alternatively, he might say: "I keep this cow and I shall sue you for the loss I "have suffered because her performance was not as warranted: "I am getting not four gallons but one gallon a day, and, there"fore, I am losing what I would have got on the sales (less "necessary expenditure) of, approximately, an extra thousand "gallons a year." If the latter course is chosen it seems to me, as I have indicated, that the depreciated, or depreciating, value of the cow has nothing whatever to do with the claim. So much, I think, is conceded; and it has, therefore, seemed to the court that it would be impossible to combine in this case a claim for the capital loss with a claim for the total loss of profit; as it would be impossible to recover, in the hypothetical case, both the £90 (being the capital loss on the cow) and the full amount of the loss due to the shortage of milk.

But in the course of these proceedings there occurred an event which has given rise, as I think, to the whole difficulty. Head (E) of the statement of claim, subparagraph (B), reads: "From April 1, 1950, to December 15, 1951, and continuing," and the defendants asked the plaintiff to give particulars of the words "and continuing." They were asking the plaintiff to state for what period of time he was alleging and intending to prove loss of profit. The actual words of the request, which are of importance, are: "Of the words 'and continuing,' stating "precisely what period is referred to and the amount of loss of "profit (if any) claimed in respect of such period." The plaintiff's answer was: "'and continuing' is the period from "December 15, 1951, to the date of trial of this action." That seems to me to be a clear and unequivocal statement by the plaintiff that, so far as his claim was based on loss of profit, he was only claiming loss of profit up to the date of the trial and that he did not propose to claim or to seek to prove loss of profit beyond that date.

The effect of that statement in the particulars left the statement of claim as a claim for the full amount of the capital loss (arrived at by setting out under each head the total sum actually spent and deducting from that the estimated break-up, or residual, value of the buildings and plant at the date, I suppose, of the statement of claim) plus a claim for loss of profit in addition; but subject to this qualification, that in the computation for loss of profit there remained in the statement of claim the item of depreciation at 10 per cent. per annum on the original capital cost.

At the trial the defendants sought to show that the plaintiff's enterprise was foredoomed to failure from the start, and that he could not have made any profit by pulverizing his clay and trying to sell it. That attempt to disprove the claim for loss of profit failed. The official referee said that he calculated the loss of profit in the following way: "Having carefully considered the "evidence, and giving due allowance, I hope, to commercial "contingencies, I estimate that during the first year, at the "beginning of which the plaintiff had no orders and during "which teething troubles would be expected, the plaintiff could "have sold 2,000 tons, during the second year 5,000 tons, and "during the third year 6,000 tons. These figures obviously must "be very largely in the nature of guesses, but if I have over-"estimated them it must be remembered that I am giving the "plaintiff no damages for loss of profit after the end of three "years." Then, after dealing with other items of calculation which I can pass over, he said: "In respect of each year I have "deducted the interest charge on the capital, but not "depreciation."

It is not open to doubt that to allow, in addition to the total capital loss, the total profit less appropriate revenue charges, is not justified; for in the absence at any rate of any allowance for depreciation, the official referee seems to have given the full amount of profits on the footing that the capital expenditure had been incurred, and at the same time he gave the plaintiff the full amount of the loss of capital so as to indemnify him for having incurred it. But I have been unable to see how, in estimating the profits in a case of this kind, depreciation really comes into the picture. I have already given my reasons for that view. The plaintiff formulated his claim showing the capital which he had lost or thrown away, so that if he recovered that sum he would be in the same position as though he had never bought this machine; and he also showed what he claimed to be the profit which he would have made, not on the footing that he had not bought the machine, but on the footing that he had bought it and that the performance of the machine had been in accordance with the warranty. When asked for particulars he said that, as regards the latter claim, he only proposed to prove damages for three years, for reasons which, no doubt, were good to him. Mr. Wilson, in opening the appeal, submitted that the inevitable inference to be drawn from the statement in the particulars and from passages in the judgment which I have read was that, although this machine was mechanically capable of operating for ten years, what he called its commercial life was limited to three years; in other words, he said that this enterprise could not in any circumstances have been a profitable commercial venture for more than three years. If that be right, there would be nothing left to argue about; but I have been unable to accept that view. In my judgment there is no basis for supposing that the official referee thought or found (certainly not expressly, and I think not impliedly) that three years was the limit of this

C. A.
1953

CULLINANE v. BRITISH "REMA" MANUFACTURING CO. LD.

Evershed M.R.

enterprise. But it does not seem to me that that conclusion affects the validity of the defendants' argument. Whatever might have been the length of time during which this enterprise could have been carried on profitably, the plaintiff chose to limit his claim in that respect to three years. I agree with Mr. Raeburn and Mr. Falk that the actual figures, which show a crescendo for the first three years, are not easily consistent with the view (in the mind of the official referee) that at the end of the three years the sales would have stopped altogether. On the other hand, as I said earlier, the whole enterprise was obviously somewhat speculative; a fact which, I think, is reflected in the words of the official referee: "if I have over-"estimated them" (that is, the profits for the first three years) "it must be remembered that I am giving the plaintiff no "damages for loss of profit after the end of three years." Those words lead me to think that the official referee may well have supposed that the total profit which would have been made on the enterprise was probably not very different from that which he awarded.

But whatever may be the answer to these problems, I come back to the point which I left a little time ago. I think that the plaintiff could choose to claim on the basis that he had wasted capital, and that he ought to be put in the position he would have been in if he had never bought this machine; or, alternatively, he was entitled to say: "I have got the machine: what I am "claiming is the loss I have suffered because its performance "falls short of that which was warranted; therefore I have not "made profitable sales which I would have made, and I claim, "accordingly, the loss of such profits." The second alternative being the larger, he was entitled to choose that; but, in my judgment, he should be limited to it. By stating that his claim for lost profit was limited to three years, he was not, in my judgment, then entitled to claim (as he, admittedly, could not claim if he had not placed the limitation on the profit) both for loss of capital *and* for loss of profit. It is said that he might do that if in the computation of profits he made due allowance for depreciation. But in my judgment depreciation has nothing to do with the profit which was lost as a consequence of the breach of warranty. And the effect of so reducing the profit would appear to be that the plaintiff first recovers for loss of capital and then has to bring into account against the profit part of what he has recovered for loss of capital.

Upon the question whether the plaintiff could have claimed for loss of profit up to the date of the hearing and have claimed an additional sum because he was at that date left with a machine which was less valuable than the machine as warranted, I say only that the plaintiff has not so claimed. If he had done so, the second part of the claim would appear to be no more than a method of computing profit for the possible profit-earning period after the date of the hearing.

The result will be that from the figures which I have mentioned the first three items ought to be omitted. Otherwise, I think that the plaintiff is receiving damages, in effect, twice over. The total amount of damages proved which the plaintiff is entitled to recover consist of the sum of £8,913 1s., under head (E), to which must be added interest, since that was deducted in calculating the £8,913 1s. The total is £10,521 5s. 9d. The purchase price of the machine is, however, unpaid to the extent of £1,078. A question arises (on which we have not yet heard argument) whether that should be treated as proper to be set off against the £10,521 so as to reduce the amount for which the plaintiff can get judgment to £9,443 5s. 9d., or whether £1,078 is more properly a subject of counterclaim—with the result that the plaintiff would be entitled to judgment for £10,521, the defendants being entitled to judgment for £1,078.

In addition to the appeal there was a cross-appeal by the plaintiff asking that the estimation of damages for loss of profit should be carried forward to the date of the judgment in this court, on the ground that the appeal had, so to say, postponed the date of judgment in the action. I am unable to apprehend that claim or to give effect to it. I have already said that the plaintiff (for reasons good, bad or indifferent) limited his claim in respect of profit up to the date of judgment in the action (which was April 1, 1953), and having so limited his claim he must, I think, be bound by that limitation. I only add that if the period were extended I have no means available upon which I could estimate any further loss of profit.

In my judgment, therefore, the appeal succeeds, the sum for damages being reduced by the elimination of the three items (A), (B) and (C); and the cross-appeal should be dismissed.

JENKINS L.J. referred to the facts, and continued:—It is not in dispute that, for the purposes of the appeal, the plant, with an actual performance of only two tons per hour, must be regarded as having been commercially useless to the plaintiff; nor is there any dispute as to the giving of the warranty or the breach of warranty. The sole question before us is as to the calculation of the damages to which the plaintiff is entitled for the breach.

The general principle applicable to the case is, I apprehend, this: the plant having been supplied in contemplation by both parties that it should be used by the plaintiff in the commercial production of pulverized clay, the case is one in which the plaintiff can claim as damages for the breach of warranty the loss of the profit he can show that he would have made if the plant had been as warranted. Where damages are awarded on that basis the object in view, as indeed in any other assessment of damages, is to put the plaintiff in the same position, so far as money can put him in the same position, as if the contract had been duly complied with or the subject-matter of the contract had conformed to any warranty given. It follows that in such a case, while no doubt the plaintiff can at his option claim damages based on the difference between the value to him of the article as actually supplied and the contract price of the article, he cannot claim both that amount, representing his capital expenditure thrown away by reason of the breach, and also the full amount of the profit which he can show that he would have made in the event of the article answering the warranty. In considering loss of profit he must be placed in the same position as if the article had been as warranted. On that hypothesis, the full contract price would have to be paid, and all other expenditure necessary to use the article for the contemplated purpose would have to be incurred before any profit could be earned at all. Therefore, where the claim is based on loss of profit it must be calculated either by estimating the difference between the contract price of the article and the value of the article as supplied, allowing the amount claimed for loss of profit only in so far as it is in excess of that amount, or, more simply, by letting the capital expenditure lie where it falls and computing the amount of loss of profit. In certain circumstances it may be to the plaintiff's advantage to claim on the basis of the difference between the contract price and the value of the article, because it may be, in some instances, that that would give him a larger sum than any sum which he could prove as representing loss of profit. Where the loss of profit is the larger sum the plaintiff, of course, will elect to take that; but he cannot have both.

The particulars of damage as formulated in the statement of claim did not conform to this principle. [His Lordship referred to the particulars of damage set out above, and continued:] It is to be observed that in arriving at the estimated loss of profit under head (E), the plaintiff allowed a deduction of depreciation at 10 per cent. on the total amount of the capital expenditure; and it should also be noted that interest for the year on the capital expenditure was allowed, which offset the charge of interest as a separate item in the particulars of damage. The estimated net profit per annum on the yearly basis as stated was then applied to the period from April 1, 1950, to December 15, 1951, which produced a figure of £29,521. That was described as "continuing." The defendants sought particulars of the expression "and continuing," and received this answer: "'And continuing' is the period from December 15, 1951, to "the date of trial of this action." As I have said, judgment in the action was given exactly three years from the date of delivery of the plant; so that the effect of the particulars of the words "and continuing" was that the plaintiff was limiting his claim to damages for loss of profit to the profits which he could show he would have made during that period of three years if the machine had been as warranted. Under that heading, the official referee arrived at the figure of £8,913 1s., the period being limited to three years.

It will be observed that the mode of formulating the particulars of damage adopted in the statement of claim was to take the course (contrary to the principle I have endeavoured to state) of allowing the plaintiff damages in respect of his capital expenditure thrown away and allowing him in addition his estimated loss of profit. But, as against that, it is to be noted that, as I have already mentioned, in computing his loss of profit the plaintiff allowed depreciation at 10 per cent. on his capital expenditure. It follows that if the loss of profit was to be estimated with respect to a period of ten years or any longer period the items separately claimed in respect of capital expenditure and allowed by the official referee would have been in substance wiped out, or rather more than wiped out.

Mr. Raeburn, for the plaintiff, did not, as I understand him, quarrel with the general principle which I have endeavoured to state, but his argument was of this nature. He accepted the position that if the loss of profit was to be calculated over a period of ten years (that being the period accepted by the official referee as the probable life of the plant) it would be wrong to give the plaintiff both the full amount of the loss of profit estimated over the whole of that period and also the amounts claimed as capital expenditure thrown away. But, he said, the period for the purpose of calculating the loss of profit was in fact limited to three years, and he said that that was only three-tenths of the estimated life of the plant. Therefore, in his contention, the plaintiff would not have received all the damages to which he was entitled unless he received something on account of his capital expenditure thrown away. At the end of the three years, said Mr. Raeburn, assuming a life of the plant of ten years, the plant, if the warranty had been complied with, would have been a plant still capable of operating for another seven years at a profit, and if profits for that period of seven years had been estimated and added to the profits for the first three years all would have been well; but as it was the plaintiff got profits for three years only and nothing to compensate him for his loss of profit thereafter. Mr. Raeburn submitted, I think, that that loss of profit could be properly allowed for by leaving in the calculation of damages the whole of the capital thrown away; though he was, I think, disposed to concede that, as against that, it would be right to allow the defendants depreciation at 10 per cent. on that capital expenditure for the period of three years to which the estimate of profit extended. I find myself unable to accept Mr. Raeburn's contention. As a matter of pleading the plaintiff in the first instance claimed for loss of profit without limit as to time, and on that footing he included the additional sum representing loss of capital expenditure thrown away, though at the same time allowing the 10 per cent. depreciation which I have mentioned. When asked in respect of what period the loss of profit was claimed by the request for particulars, the plaintiff answered, in effect, that he only claimed damages in respect of loss of profit for the period down to the date of judgment. That being so, it seems to me that the plaintiff must be bound by his pleading and cannot now say: "I wish to claim a further amount representing "the profits for the residue of the life of the plant." The particulars of damage being in that form and limited in that way, I think that the only possible course is to proceed on the footing that the only damages in the way of loss of profit, either alleged or proved, consist of the loss of profit for the period of three years down to the date of the judgment.

The official referee said: "If the plant had been as warranted, "the plaintiff's intention was to use it for its life, or for so long "as it could provide profit. At the end of that time it would "be useless, and, in order to ascertain what profit he would have "made from it, there would have to be deducted from the "aggregate of his net profit the original price of the plant, unless "this had already been written off against his gross profits as "depreciation." Pausing there, although the thought perhaps is not so clearly expressed as it might have been, it appears that at that point in his judgment the official referee recognized that the plaintiff could not claim the whole of his capital expenditure thrown away and, in addition, the whole of his loss of profit, but that, if he claimed capital expenditure thrown away, he could only claim loss of profit in so far as it exceeded the amount claimed under the heading of capital expenditure. The official referee continued: "But if the plaintiff recovers the cost to him "of the plant less its residuary value he has recovered his initial "outlay, but none of the profit which he would have made from "it and which would have formed part of the value of the plant "to him. He cannot hope to replace that plant except at a "considerable expense and without having to wait for a period "of at least 14 or 15 months. Mr. Raeburn has stated that he "is content to ask for merely the estimated net profit from "April 1"—April 1, 1950—"until repayment or judgment." Then the official referee expressed his conclusion as to the profits which the plaintiff could have earned during the three years down to the date of judgment; and he went on to say, as regards the estimated output or sales of 2,000 tons in the first year, 5,000 tons in the second year and 6,000 tons in the third year, "these "obviously must be very largely in the nature of guesses, but "if I have overestimated them it must be remembered that I am "giving the plaintiff no damages for loss of profit after the end "of three years." With regard to the estimated loss of profits, he said: "In respect of each year I have deducted the interest "charge on the capital, but not depreciation."

From those passages it seems to me to be reasonably plain that the official referee, in allowing, as he did, the loss of capital expenditure in addition to the loss of profit, calculated without any figure for depreciation, was not doing that as a special method of dealing with the matter by reason of the fact that the claim for loss of profit was limited to three years. He was treating the three-year figure as representing the whole of the loss of profit, and, even on that basis, he was allowing the claim in respect of capital expenditure. Further, it is to be observed that he said in the passage to which I have already referred: "These obviously must be very largely in the nature of guesses, "but if I have overestimated them it must be remembered that "I am giving the plaintiff no damages for loss of profit after the "end of three years." That seems to me to suggest that his estimate of the profits year by year might well have been more conservative if a longer period than three years had been taken. It is to my mind impossible for this court now to proceed on any other basis. Estimates which were "very largely in the nature "of guesses" in relation to the first three years would, to my mind, become even more speculative when an attempt was made to carry the calculation on to a point of time as distant as ten years from the delivery of the plant. If a loss of profit for ten years had been claimed and sought to be established before the official referee, it is impossible to say at what additional figure he would have been likely to arrive. The court has no material on which it is possible to reach any conclusion as to that. It may be that the defendants would have succeeded in bringing the additional figure down to an inconsiderable sum. It may be that the plaintiff might have been able to justify a considerable addition. It is quite impossible to say what the result might have been. Accordingly, in my view, having regard to the state of the pleadings, this case must be dealt with on the footing that the only loss of profit claimed was the profit for the three years down to the date of judgment, which the official referee estimated at £8,913 1s.; and that being, for this purpose, the full amount of the claim for loss of profit, in my view the official referee erred in allowing the plaintiff, in addition to that sum, the items of capital expenditure under heads (A), (B) and (C). By so doing he was giving the plaintiff his damages twice over so far as the amounts allowed in respect of capital expenditure were concerned.

Accordingly, in my view, this appeal should be allowed and the damages should be reduced to the two items consisting of the interest dealt with under head (D) of the statement of claim, £1,608 4s. 9d., and the loss of profit falling under head (E), £8,913 1s. The charge for interest is, in my view, proper to be allowed, because a contra allowance of interest on the same sum, as I understand it, was made in the calculation of the loss of profit. Accordingly, in my view, the judgment in the plaintiff's favour should be reduced to the total of those two sums and the appeal should be allowed to that extent. As to the unpaid balance of purchase money, it remains to consider whether that should be dealt with as a set-off or as a judgment in favour of the defendants on their counterclaim.

There was a cross-appeal by the plaintiff in which he asked that the loss of profit might be computed over an extended period which ended with the conclusion of the present appeal. In my view that is an application to which it is quite impossible for this court to accede, and, accordingly, I think that the cross-appeal should be dismissed.

MORRIS L.J. In this case I have not found myself in entire agreement with the conclusions which have been reached by my Lords. I need hardly say that it is only with much diffidence that I venture to express a divergent opinion, but it is my duty to express my conclusions to the extent to which they differ from those reached by my Lords.

[His Lordship referred to the facts, and to the finding of the official referee that the defendants endeavoured to get the machine into the warranted condition, and continued:] The official referee said that the plant "never produced the warranted "amount of powder, and the defendants introduced various "modifications and additions in an endeavour to fulfil their con-"tractual obligations. Mr. Bareham, a senior engineer of the "defendants with very considerable technical experience, visited "the plaintiff on four occasions: first, when it was commis-"sioned, for ten days; again in April and May, 1950, for 13 days; "in July and August for 11 days; and, finally, in August, 1951. "when he stayed about 10 days. Other representatives of the "defendants were there also. They were quite unable to make "the plant produce more than about 2 tons per hour output. "I find as a fact that the plant is incapable of producing more "than about one-third of the warranted output when using the "plaintiff's clay."

I should imagine that the defendants were very disappointed with the performance, and there is every reason to think (and the passage I have quoted illustrates it) that they made genuine and honest endeavours to try to get the plant into satisfactory working condition. But unhappily they failed: and so time passed. When it came to the litigation which ensued, the defendants said to the plaintiff: "Even if we had delivered to you "a plant that was in compliance with the warranty we gave, "nevertheless, the whole thing would have been useless to you; "it would have been a white elephant, for you could not have "made any profits." That sort of contention on the part of a seller who, unhappily, has been unable to comply with a warranty which he has given, never meets with a very enthusiastic reception from the purchaser of the machine. That matter was litigated, and, no doubt, much time during the hearing, for it was a long hearing, was occupied in a careful ascertainment of the facts.

The official referee concluded that that submission on the part of the defendants failed. He said: "Mr. Wilson contended that "even if the plant had been of the quality warranted the "plaintiff could not have found an economic market for his "output, that the plant would have been a 'white elephant' "in his keeping, that he made a mistake in ever thinking that "he could procure an adequate market, and that the plant would, "in any case, have been valueless and the plaintiff cannot recover "any but nominal damages." As I say, that matter failed. The official referee considered the evidence as to the markets which would have been available for the plaintiff, and he concluded: "The plaintiff said that he had supposed that his main sales "would be to the rubber industry. In this he was mistaken. "However, there is, obviously, an extensive use for pulverized "clay by foundries, makers of vitreous enamelling, welding and "pottery, and in my judgment the possibility is that the plaintiff "could have made a useful addition to his income with the "products of the plant if it had been equal to warranty; it would "not have been a white elephant. It is to be noticed that "Mr. Davies himself agreed that, if the plant had been as "warranted, it would have been worth the price charged." The official referee took the view that there would be an extensive use by foundries, makers of vitreous enamelling, welding and pottery. Then, lower down on that page, he said: "The plaintiff "says that the plant is useless for the purpose for which it was "required, he cannot run it except at a loss, and this is not "seriously challenged."

In addition to the matters to which I have already referred the defendants said: "The plaintiff ought to have mitigated his "loss." That submission was not successful. The official referee said: "Finally, it has been suggested that the plaintiff "could and should have purchased other machinery in order to "mitigate his damage. I think that this would have been quite "unreasonable. To obtain a product at the rate warranted he "would have had to purchase, as I have said, more than two "attritor plants, and would have incurred all the expense of "dismantling and removing the defendant's plant, of adapting "and probably enlarging his building to accommodate the substituted machinery, and of installing it. Moreover, the defendants were suggesting that they could bring his machine up "to the warranted standard even as late as the autumn of 1951. "He could not have hoped to substitute other machines before "the end of 1952, even if by then." The official referee had already said: "He cannot hope to replace that plant except at "a considerable expense and without having to wait for a period "of at least 14 or 15 months."

It seems to me that the basis on which the damages were pleaded on behalf of the plaintiff was permissible and logical.

Perhaps I can illustrate by figures why I express this view. Supposing that a machine cost £10,000 and had a life of ten years, and supposing it were found that there would be net profits of £2,000 a year. At the end of ten years, with fulfilment of the warranty, the purchaser would have received £20,000, and allowing for the £10,000 which he had spent in buying the machine he would make £10,000 profit. Supposing that the machine was delivered to him, and supposing he paid £10,000 for it, and supposing it is found to be entirely valueless, the purchaser might say: "I am claiming simply my profits, that is "£20,000." But it seems to me that he could, alternatively, say: "out of £2,000 received by me each year I would have "allocated £1,000 each year over the ten years to pay for the "plant, and so my net profit would have been £1,000 a year. "Instead of claiming £20,000 I put it in this way: I claim back "the £10,000 I have paid for the plant, which is valueless, and "I claim the profits which I would have made, that is £1,000 "a year over ten years, £10,000." In either way of statement, the amount of the claim is exactly the same. It seems to me that in the statement of claim the matter was put in the latter way. It was pleaded on behalf of the plaintiff that, by reason of the breach of warranty, he was out of pocket. He had spent sums for the plant and for accessory plant and for buildings. He said: "I want those sums back, less, of course, the present "scrap value of what I have got, and in addition I want the "profits which I would have made, namely, my net profits: out "of the profits that I would have received each year" (and the life of this plant was ten years) "I make an allocation of one-"tenth and, making that allowance, I arrive at my net profits." It seems to me that it is permissible and logical to formulate the claim in that way. Under the heading (E), "Loss of profit," in the statement of claim there was a subtraction of depreciation at ten per cent. per annum. There came the time when the plaintiff, being asked for particulars, limited his claim. It was in the first place a claim for what he had spent, less the scrap value of what he still had, together with net profits for the whole

C. A.
1953

CULLINANE
v.
BRITISH
"REMA"
MANUFACTURING
CO. LD.

Morris L.J.

period which was covered by the words "and continuing." Being asked for particulars, he limited his claim as regards the item of profits to the period to the trial of the action. As events turned out, that proved to be a period of almost precisely three years from the date of the delivery of the plant. The claim being so limited, it seems to me that when computing profits, if they are being given in addition to what the plaintiff has lost, it would be right to follow the pattern of the statement of claim and make a deduction each year (the life of the plant being ten years) of ten per cent. from the net profits, as was originally done in the statement of claim. Mr. Wilson has submitted, as his minimum submission, that in any event there should be such a deduction from the damages as awarded. To that extent, for my part, I would accede to his submission. I would say that the damages as awarded should be reduced by three times £1,448, which makes a deduction of £4,344. But if such a reduction is made, then, in my judgment, the result is a logical one and the resultant figure is correct. It seems to me that it was quite reasonable for the plaintiff to limit his claim, as regards profits, in the way he did. There would have come a time when it would have had to be recognized, as a matter of reality, that the plant was no good and that the whole project with that plant was a fiasco. Time had passed which was quite unproductive, and that time was irretrievably lost. That being so, I should have thought that it was rational for the plaintiff to say: "I limit my claim for loss of profit." He would have to do his best to mitigate his loss. The defendants themselves said that the plaintiff had not done enough to mitigate his loss. The plaintiff would have to see what alternative steps he could take to make such profit in business as he had hoped to make as a result of a satisfaction by the defendants of the warranty they gave in regard to the machine which they had sold. Hence, I think that it was reasonable to limit the claim.

Mr. Wilson presented a formidable submission. He said: "If "profits are claimed in that way it should have been proved "that there would have been profits during the remaining seven "years of the life of this plant"; and he submitted that the limitation by the plaintiff of his claim to a period of three years had brought about the result that the plaintiff had not proved profits beyond three years and that he could not say that there would have been profits beyond the three years. I have not felt myself able to accede to that part of Mr. Wilson's submissions.

It does not seem to me that it was implicit in the limitation recorded by the delivery of particulars, nor by what was said by Mr. Raeburn at the hearing, that the plaintiff was saying: "Not only do I limit my claim to a period of three years, but I "state that profits would not have been made thereafter, and I "acknowledge that it ought not to be open to anyone to say that "profits would be made thereafter." It seems to me that the whole tenor of the judgment of the official referee was that the plaintiff would have made profitable use of this machine had the warranty been satisfied, and would have made it over the period of the life of the machine. The contention that the whole thing would have been a "white elephant" and that there would have been no markets failed. The official referee took the view that it was shown to him that there would have been demands for the product. The figures at which he arrived showed a crescendo. They showed better results as the second year succeeded the first, and the third the second. It seems to me that it would be unreal to think (and to accept Mr. Wilson's submission would involve so thinking) that at the end of three years profits would fade away, that after the rising tide there would be an evaporation and that nothing would be there. Indeed, I read the sentence from the judgment of the official referee: "These obviously must be very largely in the nature "of guesses, but if I have overestimated them it must be "remembered that I am giving the plaintiff no damages for loss "of profit after the end of three years," as meaning not that there would not be profits at the end of three years, but that there would be profits, but that no claim for them was made. I take the view that it was almost implicit in the success of the plaintiff in defeating the attack upon his claim in regard to profits that it was shown that the profits were not such that they would disappear at the end of the period in regard to which the plaintiff limited them. For those reasons I think that the basis of the claim that was pleaded sets out a reasonable way to state the claim for damages. The plaintiff at the end of a period of time found that it was wasted time, and he said: "I want, in the "first place, to avoid being out of pocket, and I want merely "to make good my loss: that is the first thing. But he said: "In addition, as I cannot start again for some time, I want what "I have actually lost, that is to say, what would have come to "my pocket by way of profits during that period." I think that that amount should be the amount of the net profit after making the appropriate allocation (or whatever word is used; for the word "depreciation" may not be apposite) that would have been made year by year so as to wipe out the purchase price of the article. I, therefore, think that with that modification, which is rather an important modification, of the view and the figure reached by the official referee, the appropriate basis of damages would be established. I think, therefore, that the plaintiff was entitled to the sum awarded by the official referee, less £4,344.

I do not desire to add anything with regard to the cross-appeal. For the reasons which the Master of the Rolls has stated, I do not feel that the cross-appeal can succeed.

[After further discussion the court gave judgment for the defendants on the counterclaim for £1,078.]

Appeal allowed. Judgment varied by substituting £10,521 5s. 9d. for £16,813 7s. 2d. on the claim: judgment for defendants on counterclaim for £1,078. Cross-appeal dismissed. Defendants to have costs of appeal and cross-appeal. Plaintiff to have costs as ordered by official referee up to date of payment into court by defendants. Thereafter each party to bear own costs of claim and counterclaim. Of the £4,000 remaining in court, £3,000 to be paid out to plaintiff's solicitors without further order, and £557 to be paid out to defendants' solicitors without further order. Balance of £443 to remain in court pending taxation of costs. Costs payable by plaintiff and defendants to be set off. Leave to appeal to House of Lords granted.

Solicitors: *Herbert Smith & Co. for Parker, Warskett & Chapman, Sheffield; Kimbers, Williams, Sweetland & Stinson for Humphries, Kirk & Miller, Wareham, Dorset.*

E. D.

HAWKINS *v.* COULSDON AND PURLEY URBAN DISTRICT COUNCIL.

C. A.

1953
Nov. 26, 27, 30;
Dec. 1, 2, 17.

Somervell, Denning and Romer L.JJ.

[1952 H. No. 26.]

Licensor and Licensee — Dangerous premises — Hidden trap known to licensor — Danger not appreciated by licensor — Liability — Test whether reasonable man, with licensor's knowledge, would have appreciated the danger—Acts of commission and omission—Darkness—Effect—Fall on steps in dark—Step defective—Requisitioned premises—Liability of council.

The plaintiff, a licensee, when descending after dark the steps of a house in the possession and under the control of the defendants, a local authority which had requisitioned it, fell and suffered injury as a consequence of the defective condition of one of the steps, which, combined with the insufficiency of light, amounted to a concealed and unusual danger. The physical facts which constituted the danger were known to the defendants through their officials, but they did not appreciate the risk involved. The trial judge, applying what he termed the objective test, whether a reasonable man, having the knowledge which the defendants possessed, would have appreciated the danger, answered in the affirmative and found the defendants negligent in failing to take measures to avoid the danger. On appeal by the defendants:—

Held, that the judge, having found that the licensors had knowledge of the physical facts which constituted the unusual danger, had applied the proper test and come to a right conclusion, and the appeal failed.

Per Denning L.J. Regarding licensees, I would suggest that there is no longer any valid distinction to be drawn between acts of commission and acts of omission by an occupier.

Corby v. *Hill* (1858) 4 C.B.N.S. 556; *Gautret* v. *Egerton* (1867) L.R. 2 C.P. 371; *Heaven* v. *Pender* (1883) 11 Q.B.D. 503; *Cooke* v. *Midland & Great Western Ry. Co. of Ireland* [1909] A.C. 229; 25 T.L.R. 375; *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74; 39 T.L.R. 54 and *Mersey Docks & Harbour Board* v. *Procter* [1923] A.C. 253; 39 T.L.R. 275 considered.

Per Denning and Romer L.JJ. Notwithstanding the darkness the plaintiff was entitled to assume that the steps were unbroken.

Dictum of Hamilton L.J. in *Latham* v. *R. Johnson & Nephew Ld.* [1913] 1 K.B. 398, 411; 29 T.L.R. 124 explained.

Decision of Pearson J. [1953] 1 W.L.R. 882; [1953] 2 All E.R. 364 affirmed.

APPEAL from Pearson J.[1]

On August 13, 1946, a house was requisitioned by the defendants, the Coulsdon and Purley Urban District Council, under authority from the Ministry of Health, for the housing of persons inadequately housed. Leading down from the porchway of the house to the garden and entrance gates were three stone steps, the top step being level with the tiled pavement of the porch. Each step was four feet six inches long, the two upper steps having a depth of six inches, and the bottom step three and a half inches at the north end, where it was broken, and one and a half inches at the south. All the steps were considerably worn down, and at the time of the requisition the bottom step was broken to some extent at the north corner; for at least a year before October 5, 1951, it was badly broken with one large piece missing, and large cracks in the part that still remained intact. The step could have been repaired at a very small cost. There was a street lamp on the pavement outside the garden, but a large fir tree came between the light from the lamp and the steps. After the requisition on August 13, 1946, a schedule of condition was prepared for the purpose of recording the state of the property on requisition; that schedule, signed by the defendants' surveyor and also by the owner, referred to the steps as "stone steps "worn and one broken at corner." Between 1946 and October 5, 1951, the defendants' officers inspected the house from time to time, and during that period both inside and outside repairs were carried out by them. The defendants' rent collectors made weekly visits to the house, and it was part of their duties to report any complaints and matters requiring attention. In 1950 the defendants' repairs supervisor inspected the house and recommended repairs to the downstairs flat, but he made no recommendations with regard to the front steps and considered that there was no outside work to be done.

---

[1] [1953] 1 W.L.R. 882; [1953] 2 All E.R. 364.

On October 1, 1951, the owner of the house, although the house still remained under requisition was, by agreement with the defendants, allowed to enter into occupation of the upper floor. She became ill, and on October 5, 1951, a friend, the plaintiff, came to visit her, arriving about half an hour before dark. The plaintiff did not look at the steps to such an extent as to see that they were broken, but went to the upper flat, where she stayed until about eight p.m. When she left there was a light in the upper landing and a light in the back part of the hall, but the porch was unlighted. As she was feeling her way down the steps in the darkness the plaintiff trod on the broken step and, as a result, fell, breaking her leg.

The plaintiff claimed damages against the defendants, alleging that they were, by virtue of a requisition, in occupation and/or control of the porchway, steps and approaches to the house, that she was lawfully visiting the person occupying the upper floor under an agreement with the defendants, and that the defendants owed a duty to take reasonable care to prevent her, on the occasion of that visit, from suffering any damage from any hidden danger or trap in the porchway, steps or approaches of which they were aware; she alleged that the porchway, steps or approaches constituted a hidden danger or trap as the defendants well knew, but that in breach of that duty and/or negligently they had failed to take such care.

The defendants denied that they owed any duty to the plaintiff or that the steps constituted a hidden danger or a trap, or that there had been any breach of duty or negligence on their part; they alleged that the plaintiff's fall was due to her own negligence in descending the steps with full knowledge of their condition and without keeping a proper look-out and without due care for her own safety. Damages, subject to liability, were agreed at £1,000.

Pearson J. found for the plaintiff. He held that the defendants, through their officers, knew of the condition of the step and as reasonable men should have appreciated that it constituted, with the insufficiency of lighting, an unusual or hidden danger.

The defendants appealed.

M. D. Van Oss for the defendants. The principles of law as to licensor and licensee stated by Lord Sumner in *Mersey Docks and Harbour Board* v. *Procter*[2] are (1) the licensee has to take the premises as he finds them, and (2) the occupier must not lay a trap for the licensee or expose him to a danger which is not obvious; but if the danger is obvious the licensee must take care for his own safety. That is a condition of the licensor's liability. He cannot conceal a danger when he does not realize that it is a danger. Where the judge has gone wrong in this case is that he cannot see any distinction between the liability to children and the liability to adults. In the case of a child licensee a special duty is imposed on the licensor. The defendants submit that *Cooke* v. *Midland and Great Western Railway of Ireland*[3] and the House of Lords decisions which established a special duty towards children are inapplicable.

If the danger is obvious to the licensee, then the licensor is not liable: see observations of Wilde B. in *Bolch* v. *Smith*.[4] That case and *Southcote* v. *Stanley*[5] led up to more modern days. Then came the dicta of Willes J. in *Indermaur* v. *Dames* [6] and *Gautret* v. *Egerton*,[7] which stand unchallenged today. In the latter case Willes J. said: "The principle of law as to gifts "is, that the giver is not responsible for damage resulting from "the insecurity of the thing, unless he knew its evil character "at the time, and omitted to caution the donee. There must be "something like fraud on the part of the giver before he can be "made answerable. . . . To bring the case within the category "of actionable negligence some wrongful act must be shown, or "a breach of some positive duty, otherwise a man who allows "strangers to roam over his property would be held to be answerable for not protecting them against any danger which they "might encounter whilst using the licence."

---

[2] [1923] A.C. 253, 274.

[3] [1909] A.C. 229.

[4] (1862) 7 H. & N. 736, 747.

[5] (1856) 1 H. & N. 247.

The duty of a licensor should not be confused with that of an invitor. The licensor gets nothing in return for his licence. It is not enough for the licensee to show that the licensor knew of the physical facts which constituted the danger; he must show that the licensor appreciated the risk involved.

[SOMERVELL L.J. You are asking this court to lay down a charter for people whose standard is below that of "the reasonable "man."]

It would be imposing a very heavy burden on the defendants to apply the test whether a reasonable man would appreciate the risk. The defendants rely on the principles stated by Willes J., and especially the words "knowledge of its evil character." Pearson J. deemed that the House of Lords decisions showed that the law of today was not in accord with the principles laid down by Willes J., but it is submitted that the judge was in error. All those cases were concerned with a special duty to children, and their Lordships were not considering the liability to an adult licensee. *Cooke* v. *Midland and Great Western Railway of Ireland* [8] affords no justification for a departure from the principles laid down by Willes J. It laid down no new principle of law.

In *Latham* v. *Johnson* [9] Hamilton L.J. said: "In darkness "where they cannot see whether there is danger or not, if they "will walk they walk at their peril." Again, of a licensee, it was said: "If he will walk blindfold, he walks at his peril, even "though he is blindfolded by the action of the elements": *per* Lord Sumner in *Mersey Docks and Harbour Board* v. *Procter*.[10]

---

[6] (1866) L.R. 1 C.P. 274.

[7] (1867) L.R. 2 C.P. 371, 375.

[8] [1909] A.C. 229; 25 T.L.R. 375.

[9] [1913] 1 K.B. 398, 411; 29 T.L.R. 124.

[10] [1923] A.C. 253, 274.

That was approved by Lord Dunedin in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck.*[11]

The reliance placed by Pearson J. on *Glasgow Corporation* v. *Taylor*[12] was not justified. It was not a licensee case. In *Cooke* v. *Midland and Great Western Railway of Ireland*[13] and in *Fairman* v. *Perpetual Investment Building Society*[14] Lord Atkinson, Lord Collins and Lord Wrenbury said that a licensor was liable in respect of dangers of which he knew " or ought to have known "; but in subsequent cases those words were held to have been added per incuriam.

Willes J. said very definitely in *Gautret* v. *Egerton*[15] that to be liable the giver must know the evil character of the gift. The relationship of the parties is the determining factor in all cases of liability, but the relationship in the present case is a most tenuous one. The tendency in legal discussion at the present day is in favour of abolishing the distinction between licensee and invitee. The duty of a licensor would become intolerably heavy if he had to go round his premises with a close scrutiny in order to see whether there was anything which, on a pitch dark night, might injure somebody. The licensee is asking a privilege and not exercising a right. Is it to be said that he is entitled to take that privilege with a standard of liability which puts upon the grantor a very heavy burden? The objective test raises this difficulty, that you then have to ascertain what a reasonable man contemplates as a danger. It is not enough for the plaintiff to say that the defendants should have foreseen what happened. She must show that as reasonable men they ought to have foreseen the probability of such an occurrence. As was said by Lord Oaksey in *Bolton* v. *Stone*[16]: " The standard of care in the law " of negligence is the standard of an ordinarily careful man, but in " my opinion an ordinarily careful man does not take precautions " against every foreseeable risk."

Frank Whitworth for the plaintiff. My submission on the law which applies may be put in two alternative ways. Either the law as to gifts does not apply, or, if it did in the days of *Gautret* v. *Egerton*,[17] it applies no longer in view of the various decided cases. Assuming that the law of gifts is that the recipient must accept the gift as he finds it, although the judge pointed out the analogy of gifts, it does not import the same standard so far as the liability of licensors is concerned. The law on the subject has passed through a process of evolution, and it is now established that the test to be applied must be the objective test. The liability for negligence depends in general on the legal neighbour relationship in cases arising out of the occupation of land. A licensor and a licensee are in that relationship. A large number of cases, culminating in *Pearson* v. *Lambeth Borough Council*,[18] support this submission. The suggestion that the responsibility in all children cases was treated as something separate and apart from the ordinary responsibility of the individual occupier of land is, it is submitted, wrong logically and on the facts. The standard of duty may be higher in respect of children, but it has no bearing on the subjective as against the objective viewpoint. One has to distinguish between allurement and fraud. So far as trapping is concerned, there need be no allurement at all.

---

[11] [1929] A.C. 358, 371.

[12] [1922] 1 A.C. 44; 38 T.L.R. 102.

[13] [1909] A.C. 229.

[14] [1923] A.C. 74; 39 T.L.R. 54.

[15] L.R. 2 C.P. 371.

[16] [1951] A.C. 850, 853.

[17] L.R. 2 C.P. 371.

The law is now sufficiently settled to require the objective rather than the subjective test. In *Pearson* v. *Lambeth Borough Council* [18] there was a finding of knowledge of the facts and that the danger was not appreciated. The question whether it was necessary to bring home to a licensor not merely knowledge of the facts which constituted the danger but also his own knowledge that those facts did constitute a danger, was left undecided. It is submitted that if the licensor did know that there was a physical fact which a reasonable man would appreciate constituted a danger, he must be held to know that there was a danger. Greer L.J. said that actual knowledge of a potential danger would tend to suffice, and all you have to know of is a physical object capable of being put into a dangerous position: *Ellis* v. *Fulham Borough Council*.[19]

[SOMERVELL L.J. I think that it was the actual knowledge which he was basing his decision on.]

Darkness will not turn something which is perfectly normal into a danger of itself. On the facts the questions for decision are: (1) Was this a trap or concealed danger? (2) If so, was there a danger of anyone being injured by the trap or concealed danger? The fact that the accident occurred does show that the circumstances were capable of causing damage. The fact that they have caused damage shows that the circumstances were such that, unless there was some unusual feature, they would and could be expected to cause damage. There was an abnormal state of affairs and the question is whether it was a reasonably foreseeable danger.

---

[18] [1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682.

[19] [1938] 1 K.B. 212.

[Reference was also made to *Farrant* v. *Barnes* [20]; *Heaven* v. *Pender* [21]; *Corby* v. *Hill* [22]; *Donoghue* v. *Stevenson* [23]; *Latham* v. *Johnson* [24]; *Glasgow Corporation* v. *Taylor* [25]; *Mersey Docks and Harbour Board* v. *Procter* [26]; *Baker* v. *Bethnal Green Borough Council* [27]; and *Fairman* v. *Perpetual Investment Building Society.* [28]]

Van Oss in reply. What Willes J. said in *Gautret* v. *Egerton* [29] was not mere temporary construction, because he was repeating what he had said in *Indermaur* v. *Dames.* [30] *Corby* v. *Hill* [31] is a very different case; liability was not based on the occupation and ownership of land but on the fact that the defendant placed the obstruction there; it is clear that the court regarded the plaintiff as an invitee.

[SOMERVELL L.J. There was not any suggestion of common interest. I think that they treated the plaintiff as a licensee.]

The importance of the distinction probably was not appreciated at that date, but the important point in the case is that the defendant was not held liable as owner or occupier of the land. The key to the judgment is in the words "he must know its evil "character." I have to go further than that and to submit that the line of authorities indicates that knowledge of the evil character is of the essence of the case: see *Pearson* v. *Lambeth Borough Council.* [32]

Cur. adv. vult.

December 17. The following judgments were read.

SOMERVELL L.J. The plaintiff in these proceedings broke her leg on October 5, 1951, when coming down the steps of No. 2, Valley Road, Kenley, on a very dark night. The house was at the time requisitioned by the defendants for housing purposes, and she had been calling on one of the occupants. The north end of the bottom step had been broken for some time, with one fairly large piece loose, and cracks on the other part. The fall, as a result of which the plaintiff's leg was broken, was caused by the broken step. The plaintiff was a licensee of the defendants, and to succeed she must establish a breach of the duty owed by a licensor to a licensee. Without begging the question of law which arises, the duty of a licensor is to warn licensees of any unusual or concealed danger of which he knows, which would not be obvious to a reasonably careful person. Apart from that, the licensee takes the premises as he finds them. There are no doubt cases in which a licensee in the dark will be presumed to be aware of what can be seen by daylight. In other cases, as here, a licensor must contemplate that those whom he is impliedly licensing, for example, callers on the occupants of No. 2, Valley Road, may come and go in darkness. The lamp in the street opposite the house, which the judge found was alight, was behind a tree and threw little if any illumination on the scene. There was a place for a light inside the door of No. 2, but no bulb was there. If this had been lighted it would have thrown some illumination on the upper steps, but I doubt if it would have lit up the break in the step.

---

[20] (1862) 11 C.B.N.S. 553.

[21] (1883) 11 Q.B.D. 503.

[22] (1858) 4 C.B.N.S. 556.

[23] [1932] A.C. 562; 48 T.L.R. 494.

[24] [1913] 1 K.B. 398; 29 T.L.R. 124.

[25] [1922] 1 A.C. 44; 38 T.L.R. 102.

[26] [1923] A.C. 253; 39 T.L.R. 275.

[27] [1945] 1 All E.R. 135.

[28] [1923] A.C. 74; 39 T.L.R. 54.

[29] L.R. 2 C.P. 371.

[30] L.R. 1 C.P. 274.

[31] 4 C.B.N.S. 553.

[32] [1950] 2 K.B. 353, 363.

The judge found that the defect in the step was a concealed danger to the plaintiff and that she was not careless of her own safety. I will set out three of his findings in paragraphs (*h*), (*i*) and (*j*) of the judgment: "(*h*) The physical facts constituting the "danger, namely, the badly broken step and the deficiency of "light, were known to the defendants through their officers "concerned with the condition of the requisitioned property. "(*i*) A reasonable man, having the defendant's knowledge of the "physical facts, would have appreciated the risk involved. (*j*) It "was not proved, and I do not consider that there are sufficient "grounds for inferring, that the defendants appreciated the risk "involved. If they had, they would presumably have incurred "the small expense necessary to remove the danger by cementing "in the broken pieces." In earlier findings the judge speaks of the concealed danger, but I think that in those passages he is using the word "danger" to express the fact that the defective step caused the accident. It proved to be a danger, but would not be a danger within this branch of the law unless a reasonable man, seeing the physical state of the step, would have appreciated the risk.

It is at this stage of the argument that I have had the greatest difficulty. The defendants employed a repairing surveyor who had seen the premises, and their rent collector called regularly. There is evidence that complaints made by the occupants were attended to, and no complaint had been made of this defective step as dangerous. It would have cost only a small sum to repair. To take words from Lord Macnaghten's speech in *Cooke* v. *Midland and Great Western Railway Co. of Ireland*,[1] does not the judge's finding involve that all these people were without common sense and ordinary intelligence? In other words, may he not have applied a higher standard than that of the reasonable man in deciding that there was a concealed danger at all? On the other hand, it may be that in the special circumstances affecting this house each side may to some extent have relied on the other. The defendants, in minor matters of this kind, may have left it to the occupants to complain. The occupants, on the other hand, may have felt that it was for the local authority to do what was necessary and proper to the premises. A better test, perhaps, is to consider a host showing off a guest who had arrived, as the plaintiff did, at dusk, and who was leaving in the dark. Having seen photographs, I think that the reasonably careful host would have given a warning that that end of the step was broken, and this may be sufficient to support the finding. I would, however, like to express a warning as to the danger of endowing the reasonably careful man with attributes which properly belong to a person of exceptional perspicuity and foresight.

That being so, the main question of law which was argued before us arises: can the defendants escape liability by not appreciating the risk involved, although a reasonable man would have done so? In the ordinary case of concealed dangers or traps the danger is obvious to anyone who knows of the physical conditions—who has seen the trap—and the point cannot arise. There is, however, a borderland in which for one reason or other a defendant may be able to satisfy the court that his common sense and intelligence quoad this particular matter is below the average. The alternative tests have been described as subjective and objective, and the terminology is convenient.

The judge proceeded on the basis that Willes J. in his well-known judgment in *Gautret* v. *Egerton*[2] was saying that the subjective test must in all cases be applied. This was the basis of Mr. Van Oss's argument for the defendants, but I do not accept it. Mr. Van Oss rightly relied on the statement in the judgment that "there must be something like fraud on the part of the "giver." This occurs in that part of the judgment where Willes J. is finding an analogy in the law as to gifts. In the same passage he says that the giver must have known the gift's "evil

---

[1] [1909] A.C. 229; 25 T.L.R. 375.

[2] (1867) L.R. 2 C.P. 371, 375.

C. A.
1953

HAWKINS
v.
COULSDON
AND
PURLEY
URBAN
DISTRICT
COUNCIL.

Somervell L.J.

"character at the time, and omitted to caution the donee." Later: "Every man is bound not wilfully to deceive others, or do "any act which may place them in danger." In the ordinary case where danger exists there would, of course, have been something like fraud and wilful deception. The question is whether in the borderland in which the present argument moves Willes J. is intending to lay down the subjective test. I find in the judgment indications that he had in mind the objective test. This can, I think, be gathered from the words "or do any act which may "place them in danger."

That was, I think, the view of those words taken by Sir Baliol Brett M.R. in his well-known judgment in *Heaven* v. *Pender.*[3] Willes J., just after the passage which I have quoted, refers to *Corby* v. *Hill.*[4] In that case the plaintiff was a licensee, the defendant being not the occupier, but there by permission of the occupier. The defendant had placed materials on the ground which caused the accident. Both Cockburn C.J. and Willes J. himself deal with the matter on the assumption that the obstruction had been placed there by the owner or occupier. Cockburn C.J. says that "it was not competent to them to place thereon "any obstruction calculated to render the road unsafe, and likely "to cause injury." Willes J. in his judgment clearly applies the objective test as against the defendant. He states the form of declaration which he would have drawn, in which he uses the words "likely to prove dangerous to persons driving along the "road." As I read it he would have applied the same test if the obstruction had been placed there by the owner.

On the assumption that I am wrong in the view which I take of Willes J.'s judgment, I agree with the judge that the decisions to which he refers in the House of Lords, concerned with accidents to children, are authorities for applying the objective test in the present case. Mr. Van Oss sought to distinguish these cases on the ground that they dealt with accidents to young children and had, indeed, been said to be in a class apart. They are, of course, in one sense in a class apart in that, for example, no adult who chose to play with a turntable would be able to recover damages if he injured himself. I agree with what the judge says in the following sentences, and do not find it necessary to examine these cases in detail: "It thus appears that in the case of a "child licensee the objective test is to be applied in deciding "whether the licensor had knowledge of the danger. Is there any

---

[3] (1883) 11 Q.B.D. 503, 514.

[4] (1858) 4 C.B.N.S. 556, 563, 567.

C. A.
1953

HAWKINS v. COULSDON AND PURLEY URBAN DISTRICT COUNCIL.

Somervell L.J.

"reason for applying a different test in the case of an adult "licensee? There are possible differences between a child licensee "and an adult licensee with regard to the inference of leave and "licence, the existence of a trap and the sufficiency of the warning. But I cannot see any reason why any different test should "be applied in deciding whether the licensor had knowledge of "the danger. Moreover, there is at least some indication of the "objective test applying to the case of an adult licensee in the "passage which I have already cited from Lord Sumner's speech "in *Mersey Docks and Harbour Board* v. *Procter*,[5] containing the "words: 'As usual in cases of duties of care, the reasonable man "'is the standard on both sides. The licensor must act with "'reasonable diligence to prevent his premises from misleading "'or entrapping a licensee, who on his side uses reasonable judg"'ment and conduct under circumstances that can be reasonably "'foreseen'."

As I have already said, in most cases the risk is obvious to anyone who sees the place and the two tests coincide. Undoubtedly knowledge at any rate of the state of affairs was the basis, and this explains the use of words appropriate to the subjective test. For example, Mr. Van Oss relied on the way in which Buckley L.J. dealt with the matter in *Lowery* v. *Walker*.[6] In that case the danger was a vicious horse, and there was a finding of fact of the county court judge that the defendant knew that the horse was dangerous. Mr. Van Oss further relied on words used in three cases, *Coates* v. *Rawtenstall Borough Council*,[7] *Ellis* v. *Fulham Borough Council*,[8] and *Pearson* v. *Lambeth Borough Council*.[9] In those cases a somewhat different problem arose. For example, in *Ellis's* case the plaintiff, a small boy, was cut by broken glass while paddling. The defendants, the local authority, did not know of the existence of the actual piece of glass which caused the injury, but knowing of the possibility of its presence they were found to have that actual knowledge of the danger which fixes the licensor with liability. That seems to me a different point, and in the last of the cases—*Pearson's* case—Asquith L.J. refers to the issue which has arisen in this case, but found it unnecessary to decide it.

---

[5] [1923] A.C. 253, 274; 39 T.L.R. 275.

[6] [1910] 1 K.B. 173, 190; 26 T.L.R. 108.

[7] (1937) 157 L.T. 415; [1937] 3 All E.R. 602.

[8] [1938] 1 K.B. 212; 53 T.L.R. 884; [1937] 3 All E.R. 454.

[9] [1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682.

It was not suggested that there was any case which had turned on the applicability of the subjective as against the objective test in the circumstances as set out in the judge's judgment. In so far as the matter is to be considered apart from authority, I have no hesitation in adopting the objective test. There is no difficulty in a principle based on a defendant's knowledge of facts as, for example, in fraud. On the other hand, I can see difficulty as to the meaning of the formula "recognizing the risk." How great a risk would have to be recognized? I can foresee possibilities of the reasonable man who had been expelled by one door returning in a somewhat different guise by another. For those reasons I would dismiss the appeal.

DENNING L.J. It is sometimes said that the duty of an occupier to a licensee is only to warn of dangers *actually known* to the occupier; whereas his duty to an invitee is to warn him, not only of dangers of which the occupier actually knows, but also of those of which he *ought to know*. This distinction is supposed to be found in the judgment of Willes J. in *Gautret* v. *Egerton*,[10] as contrasted with his judgment in *Indermaur* v. *Dames*[11]; but I do not believe that the distinction is well-founded.

Take, first, the case where a licensee is injured by the negligent conduct of the occupier or his servants in the course of things which they are doing on the land. Suppose, for instance, a sightseer is allowed into a private works and, whilst there, he is injured by the negligent driving of a vehicle or the negligent operation of a crane. He clearly has a cause of action today; but he would not have had one twenty years ago. The reason is because he would in the old days have been defeated by the doctrine of common employment, which strangely enough was applied not only to servants but also to licensees, *Southcote* v. *Stanley*,[12] and volunteers, *Degg* v. *Midland Railway Co.*[13] In the nineteenth century it was the fashion to put licensees and volunteers into the same category as servants, and to hold that they had agreed to accept the risk of negligence on the part of the servants of the occupier. As recently as 1929 it was stated in Smith's Leading Cases, 13th ed., p. 863, that a licensee cannot sue "for supervening negligent "conduct on the part of the servants of the owner of the "premises: for danger of injury from such negligence may be "considered as bargained for and the risk thereof accepted by "the licensee." In 1948, however, the doctrine of common

[10] L.R. 2 C.P. 371.

[11] (1866) L.R. 1 C.P. 274.

[12] (1856) 1 H. & N. 247.

[13] (1857) 1 H. & N. 773.

employment was abolished; and with it must go this peculiar offshoot about licensees and volunteers. It is impossible to suppose that a licensee, any more than a servant, agrees to accept the risk of negligence. He can always sue for negligence in the course of things being done on the land. His disability, if any, is confined to the static condition of the premises, that is, to dangers which have been there for some time: see *Dunster* v. *Abbott*.[14]

Let us consider, however, this question of the static condition of the premises. It is said that the licensee must take the premises as he finds them; but this is far from being correct. Take the case where a licensee is injured by the dangerous condition of the premises, a static condition, if you please, but the danger is due to a negligent *act of commission*, that is, something done by the occupier or his servants on the land. Suppose, for instance, the occupier negligently places a pile of slates on his private road in such a manner as to be likely to prove dangerous to persons driving along the road; and a visitor at night time drives into them and is injured. There is high authority for saying that the occupier is liable. It is not necessary for the injured person to show that the occupier actually knew the slates were dangerous, but only that he knew that people were likely to pass along the road. Once he has that knowledge he is liable for his negligence in placing the slates there. In other words, he is liable for a state of affairs created by him—by an act of commission—which he knew or ought to have known was a danger. That appears distinctly from the case in 1858 of *Corby* v. *Hill*,[15] and particularly from the form of declaration suggested by Willes J.[16] as paraphrased and explained by Sir Baliol Brett M.R. in his famous judgment in *Heaven* v. *Pender*,[17] which was approved by the House of Lords in *Donoghue* v. *Stevenson*.[18]

It is in the case of *Corby* v. *Hill*[19] that we first find mention of a "trap." Willes J. said, "The defendant had no right to "set a trap for the plaintiff," meaning thereby simply that the defendant was not, by an act of commission, negligently to create a danger even for a licensee. Sir Baliol Brett M.R. took the matter up in *Heaven* v. *Pender*.[20] He said: "To lay a trap "means in ordinary language to do something with an intention. "Yet it is clear that the duty extends to a danger the result of

---

[14] [1954] 1 W.L.R. 58, 59; [1953] 2 All E.R. 1572.

[15] 4 C.B.N.S. 556.

[16] Ibid. 567.

[17] 11 Q.B.D. 503, 512.

[18] [1932] A.C. 562; 48 T.L.R. 494.

[19] 4 C.B.N.S. 556.

[20] 11 Q.B.D. 503, 509.

"negligence without intention." Before leaving *Corby* v. *Hill*[21] it should be noted that Cockburn C.J. emphasized that the act complained of was an act of commission.

Turn now to acts of omission. Take a case where a licensee is injured by the dangerous condition of the premises, but the danger is due to a negligent act of omission by the occupier or his servants, such as a failure to repair or to light or to warn. Nearly one hundred years ago, when the point first arose for decision, the law said that the licensee was in the same position as a servant and could not sue at all. It was assumed, without question, that a servant could not sue for defects in the premises or plant. Hence a licensee could not sue. Thus, in 1856, when a visitor was leaving a house, a piece of glass fell out of the door and injured him. It was due to a negligent omission by the occupier to inspect or repair. It was not an act of commission, as Bramwell B. was careful to point out, but an act of omission. The court dismissed the claim on the ground that as a servant could not sue for the defect, so a visitor could not. Pollock C.B. said that a visitor "is in the same position as any other member of "the establishment, so far as regards the negligence of the master "or his servants, and must take his chance with the rest": *Southcote* v. *Stanley*.[22] I need hardly say that that is not the law of master and servant today. A master must now take reasonable care to see that his plant and premises are safe for his servants.

Within the short space of ten years, however, the courts, under the guidance of Willes J., abandoned the analogy of a servant and adopted the analogy of a gift. The reason is not far to seek. During those ten years the courts of this country had for the first time to consider the question of gifts of chattels which turned out to be defective; and it was said in *Blakemore* v. *Bristol and Exeter Railway Co.*,[23] and in *MacCarthy* v. *Young*,[24] that a gratuitous giver or lender of a chattel is liable for its defective state, if he actually knows of the defect; but not otherwise. Drawing on that analogy, and applying it to acts of omission, Willes J. held that the occupier of premises was liable to a licensee if he actually knew of the danger and failed to give warning of it; but that if the occupier did not actually know of the danger he was not liable. Thus, in *Gautret* v. *Egerton*[25] the plaintiff was crossing a bridge in some dock premises when he fell into a cutting and was drowned. The complaint against the owners was for a negligent

[21] 4 C.B.N.S. 556, 562.

[22] 1 H. & N. 247, 250.

[23] (1858) 8 E. & B. 1035.

[24] (1861) 6 H. & N. 329.

[25] L.R. 2 C.P. 371.

act of omission. His claim was dismissed. Willes J. said that: "a permission to use the way must be taken to be in the character "of a gift. The principle of law as to gifts is, that the giver is "not responsible for damage resulting from the insecurity of the "thing, unless he knew of its evil character at the time, and "omitted to caution the donee." But Willes J. made it clear that the occupiers would be liable for a negligent act of commission. He quoted *Corby* v. *Hill*[26] and said that every man is bound *not to do* any act which may put others in danger.

It is as well to pause at this point and consider this analogy of a gift; for you will find that just as the law of master and servant has changed in the last hundred years so has the law of gifts. The decision of the House of Lords in *Donoghue* v. *Stevenson*.[27] makes the earlier cases on gifts quite out of date. There can be little doubt that the cases of *Blakemore* v. *Bristol and Exeter Railway Co.*[28] and *MacCarthy* v. *Young*,[29] on which Willes J. relied, would be decided differently today. Let me give some modern instances. Suppose that the manufacturer of a special soap sends out samples by way of gift to members of the public, and owing to negligence in manufacture a user of the soap suffers from dermatitis. Surely there is a cause of action, even though the manufacturers did not actually know of its evil character at the time. Again, suppose that hospital authorities treat a patient negligently, they are liable, even though they give their services gratuitously. If they give him food which through their carelessness has been mixed with some injurious ingredient, are they not also liable even though they did not know of its injurious character? There is no difference in principle between such a case and the case where the driver of a car gives a friend a lift.

I propose, therefore, to put the law of gifts on one side and to consider simply the law about licensees: and as to them I would suggest that there is no longer any valid distinction to be drawn between acts of commission and acts of omission. It always was an illogical distinction. Many acts of commission can be regarded as acts of omission and vice versa. It all depends on how you look at it. Thus, in *Corby* v. *Hill*[30] the negligent act was regarded as one of commission in placing slates on the road; but it might just as well have been regarded as an act of omission in failing to give warning of them at night by means of a red lamp.

---

[26] 4 C.B.N.S. 556.
[27] [1932] A.C. 562.
[28] 8 E. & B. 1035.
[29] 6 H. & N. 329.
[30] 4 C.B.N.S. 556.

That is, indeed, how Scrutton L.J. regarded it in *Kimber* v. *Gas Light and Coke Co.*[31] It seems to me that the real significance of an act of commission is that it means that the occupier must have actual knowledge of the state of affairs he has created. Taking that significant feature and applying it to an act of omission, you will find that liability depends on whether the occupier has actual knowledge of the state of affairs existing on the land, no matter whether he himself created it or someone else. Once he has that knowledge, then if he knows or ought to know that it is a danger, he is under a duty to use reasonable care to prevent damage from that danger.

I realize that this means a departure from the principle stated by Willes J. in *Gautret* v. *Egerton*[32]; but it is not a departure from the decision itself. The decision can be explained on the footing that the danger was obvious and known to the man who fell into the cutting. At any rate, the declaration did not assert that the danger was unknown to him; and that was a fatal flaw in it. Willes J. himself made that plain at the top of p. 373 and the foot of p. 374. So did Sir William Baliol Brett M.R. in *Heaven* v. *Pender*,[33] and Lord Sumner in *Fairman* v. *Perpetual Investment Building Society*.[34] A licensee can never complain of dangers which are obvious or known to him.

In support of this departure from *Gautret* v. *Egerton*[35] I would point out that during the last fifty years there have been many cases which show that no distinction is now to be drawn between acts of commission and acts of omission. In the first place, there are the cases about children who have been allowed to come on to the land and have meddled with things there. They are licensees. The question in such cases is whether the occupier has actual knowledge of the state of affairs existing on the land and the tendency of children to meddle. Once he has that knowledge, then if he knows or ought to know that it is a danger, or will be a danger if they meddle, then he is under a duty to use reasonable care to prevent damage from that danger; and this is so whether it arises from an act of omission or commission. That is, I think, fully established by *Cooke* v. *Midland and Great Western Railway Co. of Ireland*[36] (failure to lock a turntable), and many cases in this court down to *Pearson* v. *Lambeth Borough Council*[37] (failure to padlock a grille). In each case the acts complained of were acts of omission. In the words of Asquith L.J.[38]: "a simple precaution was omitted which would have "thwarted or rendered innocuous the possible actions of the "third persons." The occupier negligently failed to take that precaution and was held liable. I do not think that there is any difference between a child licensee and an adult licensee except that a child will meddle where an adult will not, and this fact must be taken into account in deciding whether the occupier has been negligent.

---

[31] [1918] 1 K.B. 439, 447; 34 T.L.R. 260.

[32] L.R. 2 C.P. 371.

[33] 11 Q.B.D. 503, 514.

[34] [1923] A.C. 74, 94; 39 T.L.R. 54.

[35] L.R. 2 C.P. 371.

[36] [1909] A.C. 229.

[37] [1950] 2 K.B. 353.

In the second place, there is the decision of the House of Lords in *Fairman's* case.[39] The complaint there was of an act of omission. The stairs leading to some flats were worn away. The landlord had a caretaker living there who knew of this state of affairs. The landlord failed to repair the stairs and Miss Fairman, who was a lodger in one of the flats, was injured. The House of Lords held that she was a licensee, and that the landlord was under an obligation not to lay a trap for her. They held that there was in fact no trap because Miss Fairman had lived in the flats a long time and the danger was obvious to her; but two of their Lordships went on to define what was meant by the obligation "not to lay a trap." Lord Atkinson said [40] that the landlord was "bound not to expose her, without warning, to a hidden peril, "of the existence of which he knew, or ought to have known"; and Lord Wrenbury [41] used words to the like effect. So did Lord Hailsham L.C. in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck.*[42]

It has sometimes been said that those observations, by introducing the phrase "ought to have known," were made per incuriam; but an explanation has been put forward which has been described by Lord Greene as "very attractive": see *Baker* v. *Bethnal Green Borough Council.*[43] It is this: if the occupier actually knows the physical condition of the premises, and a reasonable man would have realized that it was a danger, the occupier must be taken in law to have knowledge of the danger, because he ought to have realized it too. He ought to know what a reasonable man would know. I think that explanation is correct. It must be remembered that in *Fairman's* case [44] the landlord through his caretaker actually knew of the condition of the stairs, but did not realize that they were a danger. When the statements of their Lordships are read against that background, it becomes clear that what they mean is this: once an occupier has actual knowledge of the state of affairs existing on his land, then if he knows or ought to know it is a danger he is under a duty to warn a visitor of it unless, of course, the danger is obvious.

---

[38] [1950] 2 K.B. 364.

[39] [1923] A.C. 74.

[40] Ibid. 86.

[41] Ibid. 96.

[42] [1929] A.C. 358, 365; 45 T.L.R. 267.

[43] [1945] 1 All E.R. 135, 140.

[44] [1923] A.C. 74.

Thus far I have considered only the authorities; but when we come to consider the matter upon principle, it is clear that there should be no difference between an act of commission and an act of omission. If an occupier actually knows of a state of affairs on his land which a reasonable man would realize was a danger, he should not be allowed to escape from his responsibilities on the plea that he was not a reasonable man and did not realize it.

I ought to add that when I speak of the "actual knowledge" of the occupier of the existing state of affairs, I include also his presumed knowledge of it. It has been well said that "an "absentee owner or an occupier oblivious of what is happening "under his own eyes is in no better position than a man who "looks after his property": *per* Lord Maugham in *Sedleigh-Denfield* v. *O'Callaghan*.[45] That was, it is true, a nuisance case, but in this respect nuisance is an identical twin with negligence. Thus, in *Ellis* v. *Fulham Borough Council*,[46] there was broken glass in the paddling pool. The council did not actually know that the piece of glass was there. They hoped that it had all been raked out, but owing to their negligence the rake was ineffective. They could not rely on their own negligence to excuse their want of knowledge. So knowledge was imputed to them. Similarly, if an occupier has once known of the state of affairs but has temporarily forgotten it, his forgetfulness would not avail him.

Mr. Van Oss said that if we affirm the judge's view of the law—as we do—there will be little difference left between an invitee and a licensee. I think that there is some truth in this, but it is not a matter for regret. It has all come about because the obligation to a licensee—commonly expressed in the phrase "not to lay a trap"—has now been interpreted so as to impose a liability for unusual danger due to the negligence of the occupier whether by an act of commission or omission. Meanwhile, the obligation to an invitee has been expressed in almost identical terms—a duty to use reasonable care to protect the invitee against "traps," see *Hayward* v. *Drury Lane Theatre and Moss' Empires*,[47] that is, against unusual dangers which are not obvious or known to the invitee: *London Graving Dock* v. *Horton.*[48] Lord Sumner himself anticipated this confluence when he said in a typical case, where a visitor was lawfully using a recognized way, "it makes no difference to the liability whether she was "the defendants' licensee or their invitee. Under the present "circumstances the obligation was only not to lay a trap for her, "and none was laid": see *Fairman's* case.[49]

---

[45] [1940] A.C. 880, 887; 56 T.L.R. 887; [1940] 3 All E.R. 349.

[46] [1938] 1 K.B. 212.

[47] [1917] 2 K.B. 899, 911; 33 T.L.R. 557.

In the result it seems to me that nowadays, in the case of an unusual danger which is not obvious or known to the visitor, it can fairly be said that the occupier owes a duty to every person lawfully on the premises to take reasonable care to prevent damage. The duty is not to invitees as a class, nor to licensees as a class, but to the very person himself who is lawfully there. What is reasonable care in regard to him depends on all the circumstances of the case. The relevant considerations include all those facts which could affect the conduct of a reasonable man and his decision on the precautions to be taken, *per* Lord Normand in *Paris* v. *Stepney Borough Council.*[50] Much depends, therefore, on the nature of the land, such as whether it is waste land or a private road. Much, too, depends on the position and nature of the danger, such as whether it is an alluring turn-table or a heap of stones. Much depends on the knowledge or means of knowledge of the occupier, the age of the visitor and so forth: see *Gough* v. *National Coal Board,*[51] *per* Singleton L.J. The circumstances vary so infinitely that no specific rules can be laid down.

But there is one point I must mention. It has been said of licensees that "in darkness when they cannot see whether there "is danger or not, if they will walk they walk at their peril": see *Latham* v. *R. Johnson & Nephew Ld.*[52]; and again of a licensee "if he will walk blindfold, he walks at his peril, even "though he is blindfolded by the action of the elements": *Mersey Docks and Harbour Board* v. *Procter.*[53] That may be generally true of waste land or open ground; but it is not, I think, true of roads, footpaths and steps. People who lawfully use a recognized way, whether as invitees or licensees, are entitled to be warned of any unusual danger which is not obvious or known to them, but of which the occupier knows or ought to know: see *Fairman's* case.[54]

---

[48] [1951] A.C. 737; [1951] 1 T.L.R. 949.

[49] [1923] A.C. 74, 92.

[50] [1951] A.C. 367, 381; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[51] [1953] 3 W.L.R. 900, 906; [1953] 2 All E.R. 1283.

[52] [1913] 1 K.B. 398, 411; 29 T.L.R. 124.

[53] [1923] A.C. 253, 274.

This brings me at long last to the facts of the case. This broken step was, I think, an unusual danger which was unknown to Mrs. Hawkins. It was not obvious in the dark. The danger was not in fact known to the council but they ought to have known of it. They knew that the step was broken, and a reasonable man in their place would have realized that it was a danger. They were therefore under a duty to her to use reasonable care to prevent damage from it. The question is: did they use reasonable care? Test the position by supposing that the council had been a householder occupying this house. Would he have mended the step? I am not sure that he would have done so. But I am quite sure that, if he had invited a lady guest to the house and was seeing her out at night he would have warned her about the broken step and told her to keep to the safe side of it. The urban district council was, of course, not the householder and could not be on the spot to warn visitors of the danger; but that does not rid them of their responsibility. It only means that, being unable to warn, they ought to have mended the step. They cannot shift their responsibility on to the occupants of the house for the simple reason that they retained the possession and control and are responsible in law. They cannot get rid of their responsibility by the plea that they are only a requisitioning authority. They ought to do whatever a reasonable man in their position would do, and that is, mend the step. It seems to me, therefore, that the council did not use reasonable care. At any rate it is a case where we ought not to interfere with the view of the trial judge unless we were clearly of opinion that he was wrong; and I am certainly not prepared to say that. I agree that the appeal should be dismissed.

Romer L.J. Pearson J., in his helpful review of the authorities, said: "Willes J. in his judgment in *Gautret* v. "*Egerton*[55] and also in the earlier judgment delivered by him "on behalf of the court in *Indermaur* v. *Dames*[56] was plainly "using the subjective test and considered that it was necessary "to apply the subjective test." In this I agree with the judge, and having regard to the language in which Willes J. in each of these two cases applied to licensees what he conceived to be the law relating to gifts, I find it difficult to arrive at any other conclusion. It appears to me, further, that this subjective approach receives support from decisions which are far more recent. For example, in *Hayward* v. *Drury Lane Theatre and Moss' Empires*,[57] Scrutton L.J. said: " A bare or mere licensee, " one who has no common interest with the owner of the " premises but is there by the owner's permission, takes the " premises as he finds them, with all their dangers and traps, a " trap being a danger which a person who does not know the " premises could not avoid by reasonable care and skill. The " owner is under no liability as to existing traps unless he " intentionally set them for the licensee, but must not create " new traps without taking precautions to protect licensees " against them."

---

[54] [1923] A.C. 74, 86, 96.

[55] L.R. 2 C.P. 371.

[56] L.R. 1 C.P. 274.

These observations were not only approved but accepted as a guide by Atkin L.J. in *Coleshill* v. *Manchester Corporation*.[58] It is not easy to perceive how a licensor can " intentionally " set a trap for a licensee if he does not know that the state of affairs which he has brought about, or which exists, is dangerous; intention can only derive from what the licensor himself knows, not from what a wiser or more thoughtful man than he would know. As against these considerations it is, I think, true that in *Heaven* v. *Pender*[59] Sir W. Baliol Brett M.R. approached the relationship of licensor and licensee from an objective angle with regard to potentiality of injury, as also did Willes J. himself in *Corby* v. *Hill*.[60] Further, the objective test has undoubtedly been applied by the House of Lords in the " children cases " from at least *Cooke's* case[61] onwards; and in *Mersey Docks and Harbour Board* v. *Procter*,[62] in which the licensee was an adult, Lord Sumner said with reference to licensors and licensees generally, " As usual in cases of duties of care, the reasonable " man is the standard on both sides." Finally, there are the much discussed observations of Lord Atkinson in *Fairman's* case,[63] of Lord Wrenbury in the same case, and of Lord Hailsham L.C. in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*.[64]

In these circumstances, and in the welter of other authority which was brought to our attention during the argument, it is, in my judgment, open to this court to apply the objective test and to hold that, provided that actual knowledge of the source of a danger is brought home to a licensor, it is sufficient then, in order to fix him with liability, to show that a reasonable man would have appreciated the dangerous quality of that source, whether or not the licensor appreciated it himself. If so, then in my opinion we should in fact so hold. The objective test is, I think, preferable for at least two reasons. First, it dispenses with the need of inquiring whether in any given case a licensor did in fact know of the potentiality of danger—an inquiry which involves, I suppose, research into both the conscious and the subconscious mind. I say this because a man may well be said to " know " something that he has been told, even although he has forgotten it: for example, that an accident of a particular kind had happened on his property before it passed into his ownership. Secondly, the subjective test unduly favours the thoughtless or stupid man and puts an unwarrantable premium on carelessness.

---

[57] [1917] 2 K.B. 899, 913–4.

[58] [1928] 1 K.B. 776, 792; 44 T.L.R. 258.

[59] 11 Q.B.D. 503.

[60] 4 C.B.N.S. 556.

[61] [1909] A.C. 229.

[62] [1923] A.C. 253, 274.

[63] [1923] A.C. 74, 86, 89, 96.

[64] [1929] A.C. 358, 365.

The next point to consider is whether the fact that the accident occurred in the darkness affords a defence to the plaintiff's claim. There are judicial observations on this subject which, if taken at their face value, would indicate that this question should receive an affirmative answer. In *Latham's* case [65] Hamilton L.J. said with regard to licensees: " In darkness where they cannot see whether there is danger or not, if they will walk, they walk at their peril." This observation of Hamilton L.J. was approved by Lord Dunedin in *Robert Addie's* case.[66]

Pearson J. in his judgment said that " there is no absolute rule of law that in all cases a licensee moving in the dark takes the risk of any danger which in daylight would be obvious." This statement is clearly correct and Mr. Van Oss did not contend to the contrary. It seems to me that the question must depend on the circumstances of each particular case. There are some things which (as was pointed out by Lord Wrenbury in *Fairman's* case [67]) a licensee is entitled to assume, because they are things which every reasonable man would be entitled to assume and could not be regarded as negligent for assuming. So in the present case the plaintiff, who had observed nothing unusual about the steps when she entered the house, was entitled to assume, when leaving in the dark, that they were unbroken and therefore suitable for the purpose for which they were provided; for such is the usual and common characteristic of doorsteps. Accordingly, in my judgment, the fact that the accident occurred during the hours of darkness is irrelevant to the plaintiff's claim.

---

[65] [1913] 1 K.B. 398, 411.

[66] [1929] A.C. 358, 371.

[67] [1923] A.C. 74, 96.

There remains the question whether the defendants, who knew on the judge's finding of the defective condition of the step, ought reasonably to have foreseen that it was calculated to endanger licensees who used it for the purpose of entering or leaving the house. This question has caused me much difficulty, if only for the reason that several people did know of the defect in the step and yet took no measures to remedy it or to provide any kind of warning with regard to it; and, if the defendants are to be held liable, all these people must be regarded as falling short of the standard of the reasonable man. In cases such as the present there is a very real danger of being "wise after the "event"; or (which comes to much the same thing) of endowing the ordinary reasonable man with the prophetic vision of a clairvoyant. If the judge had decided this issue in favour of the defendants, I for one should have been by no means surprised and his decision could not have been successfully challenged in this court. He decided it, however, in favour of the plaintiff, and it cannot be said that there was no evidence to support his view. Moreover, I cannot but think that a man of ordinary prudence, who owned the house and was leaving it in the hours of darkness, would do so warily, knowing the "evil "character" of the thing below. Accordingly, as my brethren have pointed out, he would be singularly failing in the duties of a host if he left an unsuspecting guest departing into the night to find the defect for himself by stepping into it. I therefore agree that the judge's conclusion on this point ought not to be disturbed. In the result I am in agreement with my brethren that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *William Charles Crocker; Speechly, Mumford & Craig.*

A. W. G.

1953
Dec. 9.

Lord Goddard C.J.,
Sellers and
Barry JJ.

CALVERT *v.* MAYES.

Criminal Law — Vagrancy — Prostitution — Living on the earnings of prostitution—Money paid by men to hire-car driver for use of car as brothel—Money paid for use of house as brothel—No money paid by or to prostitutes—Vagrancy Act, 1898 (61 *&* 62 *Vict. c.* 39), *s.* 1 (1) (3)—*Criminal Law Amendment Act,* 1912 (2 *&* 3 *Geo.* 5, *c.* 20), *s.* 7.

The defendant was habitually in the company of prostitutes and exercised direction and influence over their movements and generally aided and abetted their prostitution. He knowingly permitted and encouraged the use of his house and a hire-car driven by him for the purposes of prostitution. The prostitutes themselves received no money from the men concerned—their remuneration being in the form of food, drink, clothes and entertainment—nor did they pay any money to the defendant, but he received money from the men for the use of his house and his car which, but for the prostitution, he would never have received:—

Held (*per* Lord Goddard C.J. and Sellers J.), that the defendant was living on the earnings of prostitution within the meaning of section 1 (1) of the Vagrancy Act, 1898; or (*per* Sellers and Barry JJ.) was deemed so to be living within subsection (3).

Per Lord Goddard C.J. The defendant had received money which, but for the prostitution, he would not otherwise have received, and the position was just the same as if the prostitutes had received the money from the men concerned and handed it over to the defendant.

CASE STATED by King's Lynn Quarter Sessions.

An information was laid by a superintendent of police against the defendant, Robert George Mayes, a taxi-cab driver, for that he, during the six months last past, being a male person, unlawfully and knowingly did live in part on the earnings of prostitution contrary to section 1 (1) of the Vagrancy Act, 1898.[1] The defendant was convicted by the justices and sentenced to three months' imprisonment. He appealed to quarter sessions.

---

[1] Vagrancy Act, 1898, s. 1: "(1) "Every male person who—(*a*) knowingly lives wholly or in part on the "earnings of prostitution . . . shall "be deemed a rogue and vagabond "within the meaning of the Vagrancy "Act, 1824, and may be dealt with "accordingly. (2) If it is made to "appear to a court . . . that there is "reason to suspect that any house . . . "is used by a female for purposes of "prostitution, and that any male person residing in or frequenting the "house is living wholly or in part on "the earnings of the prostitute, the "court may issue a warrant authorizing any constable to enter and "search the house and to arrest that "male person. (3) Where a male "person is proved to live with or to "be habitually in the company of a "prostitute or is proved to have exercised control, direction, or influence "over the movements of a prostitute "in such a manner as to show that "he is aiding, abetting, or compelling "her prostitution with any other person or generally, he shall, unless he "can satisfy the court to the contrary, "be deemed to be knowingly living "on the earnings of prostitution."

The following facts (inter alia) were proved or admitted before the recorder: The defendant, together with his wife and four children, occupied a dwelling-house in King's Lynn. At all material times he was employed as an agricultural labourer, but from August, 1952, he was also employed part time as a hire-car driver at a weekly wage of £2 plus commission. Throughout the period of twelve months prior to April, 1953, a number of young women who were prostitutes came to King's Lynn on the advent of American Air Force servicemen. The prostitutes had no fixed place of abode and frequented both the inside and the outside of certain premises, mainly a hotel and a public house extensively patronised by the servicemen, with the purpose of introducing themselves or of being introduced to the American servicemen. Throughout the period of six months prior to the end of April, 1953, the defendant and the owner of the hire-cars spent most of their evenings, with the exception of the time when actually driving, inside those premises. The defendant knew that the young women were prostitutes, he was habitually in their company and he exercised direction and influence over their movements and generally aided and abetted their prostitution with American servicemen.

When he visited the premises the car he drove was parked outside, sometimes empty and sometimes with one or more of the prostitutes sitting in it. The cars driven by him were often used for prostitution as follows: on journeys from King's Lynn to the American Air Force base camp, known as "base trips," when sexual intercourse took place in the back of the car or at some convenient place during a break in the journey; on journeys to barns, haystacks or other convenient places outside King's Lynn where the prostitutes and the servicemen were left for the night and collected early the next morning, when the servicemen were driven back to their base; on short journeys, known as "quickies," and varying between three miles and two hundred yards, to secluded places when sexual intercourse took place either in the back of the car or in some convenient place, and the parties were driven back to King's Lynn. The cars were also used frequently for the conveyance of the prostitutes in order to attract American servicemen. On no occasion did any of the prostitutes pay for journeys in the car or receive any money from the servicemen, but they obtained reward in the form of food, drink, clothing and entertainment. The American servicemen concerned paid the defendant for the use of the car £2, which was the standard charge, for the journeys to the base camp, and 10s. for the shorter journeys. A free service with a late night return was provided for the servicemen at the base to King's Lynn, and but for the presence of the prostitutes and opportunities for sexual intercourse the car driven by the defendant would have been used far less for journeys to the base and not at all for the other journeys and the income of the owner of the car and the defendant's commission would have been considerably reduced.

From the beginning of 1952 until April, 1953, the defendant knowingly permitted his house to be used as a brothel, and he was convicted of that offence and sentenced to three months' imprisonment. During that period his house was frequently used by the prostitutes and servicemen for the purposes of prostitution. The prostitutes obtained reward in the form of food, drink and clothing, and the defendant usually charged the servicemen £2 per night. He provided no meals or services other than the use of the room for the night. During March, 1953, one of the prostitutes stayed for four weeks at the defendant's house on the terms that she paid him for her board and lodging by prostituting herself with men whom she brought to, or who would be brought to her at, the house; and the defendant informed her that one man per week would suffice to cover the cost of her keep for a week. That prostitute did frequently prostitute herself with American servicemen in the house, and on each occasion the defendant was paid by the serviceman concerned. During the same month at least one other prostitute lived at the defendant's house and there prostituted herself on the same terms. The house was not otherwise used as a lodging house and but for the opportunities for sexual intercourse the rooms would have been let far less frequently, if at all, and the defendant would not have been able to demand such a heavy charge for the use of the room.

Arrangements for the use of the car driven by the defendant and of his house for the purposes of prostitution were sometimes made by the prostitutes themselves and sometimes by the defendant. At all times the defendant knew the purpose for which they were being used and encouraged such user. On no occasion was any money paid to the defendant by any of the prostitutes. On occasions when they were short of money some of the prostitutes were given sums of money by the defendant to enable them to purchase meals. The money paid to the defendant by the

American servicemen was for the use of either his house or the car as a brothel.

On the part of the prosecution it was contended that the defendant had been proved guilty of the offence charged against him.

On the part of the defendant it was contended that although the women concerned were prostitutes and he had knowingly permitted his house to be used as a brothel and had knowingly used his car for the purposes of prostitution, nevertheless, as no money or reward had ever been paid to him by any of the prostitutes, and the money paid to him by the American servicemen had been paid solely for the use of the house or the car as a brothel, he had satisfied the court that he was not guilty of the offence charged against him.

The recorder was of the opinion that the defendant had satisfied the court that he had not been living in part on the earnings of prostitution, that the charge had been founded upon the wrong provision of the law and that, although the evidence would support a charge of keeping a brothel, there was no evidence to support a charge of living in part on the earnings of prostitution, and he allowed the appeal.

The prosecutor appealed.

L. K. E. Boreham for the prosecutor. There is no authority on the meaning of the word "earnings" as used in section 1 of the Vagrancy Act, 1898. "Earnings" was considered in *Doncaster Amalgamated Collieries Ld.* v. *Leech*,[2] and what was there said supports the view that the word in section 1 of the Vagrancy Act is not restricted to receipts by prostitutes themselves but extends to all money paid in respect of prostitution, no matter into whose hands it may go. If in the present case money had been paid by the American servicemen to the prostitutes, and they had paid a commission to the defendant, there would have been no doubt that he was being paid part of the earnings of prostitution. It would be remarkable if he were to be in a better position because he received the whole of the money instead of merely receiving a commission.

The recorder found, in the words of subsection (3), that the defendant knew that the young women were prostitutes and aided and abetted their prostitution, and it is submitted that unless the court can reach the conclusion on the facts that the money paid to the defendant was solely for the use of his car or his house, he was guilty of the offence charged.

---

[2] [1941] 1 K.B. 649; 57 T.L.R. 477; [1941] 2 All E.R. 7.

Edward Gardner for the defendant. The relevant words are those of section 1 (1), and the sole question is whether or not the money received by the defendant was in fact the earnings of prostitution. "Earnings of prostitution" as used in subsection (1) are limited to the actual earnings of prostitution and should not be extended to cover such profits and rewards as may arise from the supply of services, food, clothes, drinks or the use of a room —which would come under the earlier Criminal Law Amendment Act, 1885. The whole object and intention of section 1 (1) of the Vagrancy Act is to deal with men living directly on the earnings of prostitutes: see section 1 (2). Unless the court is satisfied that the defendant was living in the same house as, and on the earnings of, prostitutes, he cannot be convicted.

Subsection (3) of section 1 of the Act of 1898 was extended by section 7 of the Criminal Law Amendment Act, 1912, to a person who aided and abetted or exercised direction and control over prostitutes; and to substantiate a charge under that subsection it must be proved as a fact that the defendant received money for, or in respect of, the prostitution. [Archbold's Criminal Pleading, 32nd ed. (1949), p. 1077, was referred to.] The recorder here found that the defendant was paid the money for the use of the room or the car.

It would be anomalous if the Act were to extend to the keeping of a brothel, because then a man could be convicted under it but not a woman. The facts of this case come exactly within section 13 of the Criminal Law Amendment Act, 1885, and not within section 1 (1) of the Vagrancy Act, 1898. Had the prostitute been paid a sum of money, e.g., £2 10s., and she paid £2 10s. to the defendant for the use of a room, he would not be living on the earnings of prostitution but would be letting a room in his house for the purpose of prostitution. The money received by the defendant was not money earned by the prostitutes but money which represented the earnings of American servicemen; the prostitutes never received the money and were never entitled to it.

[LORD GODDARD C.J. The defendant would not have received the money if the woman was not in his house.]

[SELLERS J. If there had been six prostitutes living in the defendant's house, and he made a profit out of their board, would he not have been living on the earnings of prostitution?]

It is submitted that he would not, because that would bring under the Act a number of people not intended to be covered by it.

LORD GODDARD C.J. The facts found by the recorder disclose a deplorable and shocking state of affairs in the borough of King's Lynn due to the presence in the neighbourhood of an American Air Force camp, and it is to be assumed that the facts of this case will have been brought to the attention of the American military authorities who will no doubt do what they can to stop what is nothing more nor less than an open and shameless scandal.

As unfortunately very often happens when a camp is established (especially camps where the inmates are American soldiers whose earnings are very much larger than those of their English equivalents) a considerable number of prostitutes descended upon the town, and, curiously enough, their remuneration for allowing relations to take place between themselves and servicemen was not money but food, drink, clothes and a certain amount of entertainment in the way of going to the pictures and so on. It is found that they did not take money. The defendant is a taxi-driver in the service of a man named Douglas Haig Royle—who has also been prosecuted and whose appeal is pending but has been adjourned until after the hearing of this case—and these two men were indulging in the scandalous activities of encouraging and assisting the prostitution of these women.

The case contains this very remarkable finding. The defendant, a man with four children, arranged for a prostitute to live in his cottage with him for a period of four weeks on the terms that she should pay the defendant for her board and lodging by prostituting herself with men whom she brought to, or who would be brought to her at, the house. The defendant informed her that "one man per week would suffice to cover the cost of her "keep for a week." What does that mean? She lives in the house and pays nothing, it is true, to the defendant. He says that he will give her board and lodging, but that she must bring at least one man a week to the house; and when the man comes to the house he takes £2 from him. Who earns the money? The woman earns it. How does she earn it? By prostitution. Why is he not then living wholly or in part on the earnings of prostitution? It is just the same as if the American serviceman paid the girl £2 and she handed it over to the defendant. He is exactly in the position of a brothel-keeper who keeps girls on the premises and takes money from the people who come to the brothel: if not only do the girls take the money but he takes money too, it seems to me that he is living on the earnings of prostitution because the money is being earned by the prostitute. He is letting the room and the services of the woman in question.

[His Lordship referred to section 1 (1) and (3) of the Vagrancy Act, 1898, and continued:] It is said that the defendant has satisfied the court that he was not living on the earnings of prostitution because on no occasion was any money or reward paid to him by any of the prostitutes. That was because he took it from the man before the man paid the prostitute. The man was paying for the room with the prostitute in it with whom he was going to commit fornication. The defendant simply took the money before it reached the prostitute, and it seems to me that he was clearly living on the earnings of prostitution.

In my opinion the arrangement which the defendant made with one of the prostitutes clearly brings him within the terms of the statute; but no doubt it is desired that we should consider the other part of the case because we are told that other cases are dependent upon it. [His Lordship referred to the facts found by the recorder in relation to the hire-cars driven by the defendant, and continued:] The servicemen had means of making the journey back to the base but they hired the cars driven by the defendant in order that they might indulge in sexual intercourse in the cars, and for that the defendant and his employer were receiving money which they would not have received if they had not knowingly permitted the prostitutes to behave in that way.

The recorder found that: "But for the presence of the "prostitutes and opportunities for sexual intercourse the said car "would have been used far less for journeys to the American "base and not at all for the other journeys: the income of Royle "and the defendant's commission would thus have been considerably reduced"—that is to say, if they had not allowed this to take place in these cars.

In the circumstances it seems to me clear that this man was trading in prostitution. He was living on the earnings of prostitutes because they were earning money which otherwise he would never have been paid. I do not think that it matters whether he received it from the hand of the American serviceman or whether the American serviceman handed it to the girl and the girl handed it to him: in any case she was earning the money by prostituting herself. The fact that the defendant was also driving these servicemen back does not seem to me to avail him by way of defence because, although it is true that if it was a legitimate journey he would have been paid the same sum of money, the servicemen would presumably not have used the cars had the defendant not provided a prostitute but would have returned by the free transport.

The recorder, who obviously gave great care to this case, came to the conclusion that the Act did not extend to this class of case; he found that the defendant was keeping a brothel—for I think that he considered that the cars were being used as brothels as well as the house—and so he did not consider that there was an offence against the Vagrancy Act. In my opinion, that is not the right way to look at the matter. I think that the words of the Act are quite wide enough to cover the conduct shown in this case. Each case, of course, must be considered on its own particular facts, but here I think that we must reverse the decision of the recorder and find that the charge is proved. Accordingly, the defendant will have to serve the sentence which was rightly passed upon him by the justices.

SELLERS J. I agree. The facts of this case are clearly within the mischief at which the Vagrancy Act was aimed, and the only question is whether they bring it within the letter of that Act. It is clear that the defendant was trading in prostitution, both in the use of his own home, and in the activities of his employment with Royle in driving motor-cars, both for journeys to promote this prostitution and for the direct use of the cars for that purpose. The vital findings of fact are that " the defendant " knew that the said women were prostitutes, he was habitually " in their company, he exercised direction and influence over their " movements and generally aided and abetted their prostitution " with American servicemen."

I am prepared to agree with my Lord that, although it may be an extension of the interpretation which has previously been given to this Act, the facts of this case bring it within section 1 (1) of the Vagrancy Act, 1898, which provides that every male person who knowingly lives wholly or in part on the earnings of prostitution commits an offence. In my view it certainly comes within subsection (3) which was finally introduced by section 7 of the Criminal Law Amendment Act, 1912. [His Lordship read subsection 3, and continued:] The facts here clearly bring the defendant within that provision, and he has committed a crime under the Act, unless he can satisfy the court to the contrary—that he is not living on the earnings of the prostitutes or of prostitution.

The remarkable fact is that the defendant made an arrangement as a landlord letting the services of his house—or at least a room—and board and lodging to a certain prostitute on the basis that she should pay for that accommodation and those services by prostituting herself at least once a week and that he should get the proceeds of that prostitution. I should have thought that that came directly under the letter of the Act, and it in no way establishes facts which would satisfy the court that he was not living on the earnings in whole or in part of prostitution.

Mr. Gardner said that that interpretation would produce a curious position because it would mean that a male person could be convicted under this Act but in like circumstances, a female could not. I think that that is an erroneous submission, because section 7 (4) of the Act of 1912 provides in very much the same terms for a female: "Every female who is proved to have, "for the purposes of gain, exercised control, direction, or "influence over the movements of a prostitute in such a manner "as to show that she is aiding, abetting, or compelling her "prostitution with any person, or generally, shall be guilty of "an offence under the Vagrancy Act, 1898, . . . and . . . [that "Act] as amended and extended by this section shall apply "accordingly."

I do not doubt that any female who entered (as did this male) into a bargain such as this—that she should be paid her rent for the use of her room by the prostitution of the tenant—would have knowledge of the prostitution, would be aiding and abetting it, and would be getting from the earnings of the prostitute in whole or in part some benefit. I think that this is a fallacious argument, and that the Act can be so construed to apply equally to male and female.

I agree that this appeal should be allowed.

Barry J. I agree. I feel that the decision of the court is dependent upon the finding of fact that the defendant knew that the women were prostitutes and habitually exercised direction and influence over their movements, aiding and abetting their prostitution with American servicemen. In view of that finding

I am satisfied that these facts fall within the provisions of the Vagrancy Act, 1898, as amended by the Criminal Law (Amendment) Act, 1912.

Appeal allowed.

Solicitors: *Metcalfe, Copeman & Pettefar; Jaques & Co. for Ollard, Ollard & Sessions, Wisbech.*

J. F. L.

GRAINGER *v.* LIVERPOOL CORPORATION.

1954
Jan. 22.

Lord Goddard C.J., Byrne and Parker JJ.

Rates and Rating — Assessment — Rateable value — Valuation list — Alteration — Proposals for alteration of valuation list made by rating authority—Employment of surveyor by authority to review the assessment of properties—Surveyor's fees paid out of general rating fund—Power of authority to employ surveyor—Duty of local authority to make proposals for amendment of valuation list—Local Government Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 187—*Local Government Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 33, 40.

By the Local Government Act, 1948, s. 33: "(1) Valuation lists "shall . . . be prepared and amended by valuation officers of the "Commissioners of Inland Revenue . . . and (*b*) save as hereafter "provided . . . rating authorities shall have no functions in relation "to the preparation and amendment of valuation lists. (2) Nothing "in this section affects any rights of a rating authority as a person "who is aggrieved by anything done or omitted to be done by the "valuation officer in a valuation list. . . ."

By section 40: "(1) Any person who is aggrieved . . . (*b*) by "any value ascribed in the list to a hereditament or by any other "statement made or omitted to be made in the list . . . may . . . "make a proposal for the alteration of the list. . . ."

The Liverpool Corporation, a rating authority, employed a surveyor to review on its behalf the assessments of offices in the central portion of Liverpool for the purpose of making proposals under section 40 of the Local Government Act, 1948, to alter the current valuation list. From time to time the corporation, on the advice of the surveyor, served on the valuation officer proposals to alter the valuation list in respect of a number of properties, including office property of which the appellant was tenant. The surveyor's fees were ordered to be paid out of the general rating fund and the appellant, as an aggrieved person under section 187 (3) of the Local Government Act, 1933, appealed in respect of those orders on the ground that they were ultra vires because, since the coming into force of the Local Government Act, 1948, the corporation no longer had power to employ or pay a surveyor:—

Held, that Parliament, in the Act of 1948, had expressly preserved the rights of rating authorities, and other persons, to make proposals for the alteration of the valuation list and therefore the corporation, both in its capacity as ratepayer and as a rating authority, had such power; that the obtaining of professional assistance and technical advice in the preparation and making of the proposals was a necessary incident of that power; and that, accordingly, the corporation had power to pay the surveyor's fees out of the general rating fund.

Dictum of James L.J. in *Attorney-General* v. *Great Eastern Railway Co.* (1879) 11 Ch.D. 449, 484, approved by Lord Selborne L.C. (1880) 5 App.Cas. 473, 478, applied.

Semble, if such a local authority thinks that an amendment to the valuation list is required they are under a duty, as the local authority interested in fair and proper rating in the area, as ratepayers, and as a rating authority, to see that a proposal for the amendment is made.

MOTION.

The following facts appeared from the affidavits filed by the parties to the proceedings. Under the Rating and Valuation Act, 1925, the Liverpool Corporation was both the local authority for general statutory purposes and the rating authority for the City of Liverpool. During 1949 the rating authority began a revaluation of office property in the central area of the city, which comprised approximately 4,000 hereditaments with a total rateable value of £475,000. By February 1, 1950, about one quarter of those premises had been considered and their rateable value increased by £43,855, the work of revaluation having been carried out by one Isaac Dixon, the rating valuer to the local assessment committee and the Liverpool rating committee. On February 1, 1950, there came into force the provisions of the Local Government Act, 1948,[1] whereby the preparation and

---

[1] Local Government Act, 1948, s. 33: "(1) Valuation lists shall, "instead of being prepared and "amended by the bodies . . . specified "in the Rating and Valuation Acts, "1925 to 1940 . . . be prepared and "amended by valuation officers of the "Commissioners of Inland Revenue ". . . subject to the rights as to "objection and appeal specified in ". . . this Act; and (*a*) assessment "committees, county valuation com- "mittees and the central valuation "committee shall cease to exist; "and (*b*) save as hereafter provided ". . . rating authorities shall have "no functions in relation to the "preparation and amendment of "valuation lists. (2) Nothing in this "section affects any rights of a rating "authority as a person who is "aggrieved by anything done or "omitted to be done by the valuation "officer in a valuation list . . . in "relation to any hereditament."

S. 40: "(1) Any person who is "aggrieved—(*a*) by the inclusion of "any hereditament in the list; or "(*b*) by any value ascribed in the "list to a hereditament . . . or (*c*) in "the case of a building or portion of "a building occupied in parts, by the amendment of valuation lists was transferred to local valuation officers, officials of the inland revenue, and whereby local assessment committees and rating committees ceased to exist.

The corporation requested the local valuation officer to complete the revaluation of the remaining office properties, but he was unable to do so, being occupied in the preparation of the new valuation list required to be made by section 34 of the Act of 1948. There was dissatisfaction among the re-assessed occupiers, and the corporation was losing revenue by the failure to reassess the remaining properties. In August, 1952, the corporation, considering itself a person aggrieved, decided to engage outside professional assistance to review the valuation of those properties for the purpose of making proposals under section 40 of the Local Government Act, 1948, to alter the valuation list. Isaac Dixon, then in private practice, was engaged by the Rating (Special) Committee, to whom the corporation had delegated its powers as a rating authority, "to review the assessments of offices in the central portion of Liverpool on behalf of the rating authority." Assessments of properties, including office property of which the appellant was tenant, were carried out by Isaac Dixon, and on his advice a number of proposals to alter the valuation list in respect of those properties were served on the valuation officer in the name of the corporation. A large number of objections were made and the notices of appeal were served in the name of the corporation.

In the case of his property the appellant received a letter from Isaac Dixon informing him that "the Liverpool Rating Authority have instructed us to review the assessments of office property in the city, and to advise them as to what changes, if any, should be made therein. This is in pursuance of the general review of office assessments which commenced in 1949 and is as yet incomplete; it is not for the purposes of the new valuation list, which the Inland Revenue are preparing. . . ." The letter requested certain information as to the lease on which the appellant held his office. The appellant gave the information requested and subsequently received from the valuation officer a notice of proposal, together with a copy

---

"valuation in the list of that building or portion of a building as a single hereditament, may at any time make a proposal for the alteration of the list so far as it relates to that hereditament. (2) The valuation officer may at any time make a proposal for any alteration of a valuation list."

of a form of proposal signed by the town clerk, for the alteration of the list.

The proceedings of the Rating (Special) Committee were confirmed by the corporation by resolution, and payment to Isaac Dixon for his services was made out of the general rating fund under section 187 of the Local Government Act, 1933.[2] It was conceded that for the purposes of the case the payments were made in pursuance of orders of the corporation.

The appellant, as a person aggrieved by the orders for the payment of the fees to Isaac Dixon, moved the court under section 183 (3) of the Local Government Act, 1933, for directions that the orders be quashed and for such further and other directions as the court should think proper on the grounds that the corporation had no power or authority to order, or to make the payment of, the fees, and that the payments were illegal and ultra vires.

Percy Lamb Q.C., *J. Melville Kennan* and *F. Irwin* for the appellant. As rating authority the corporation is a statutory body with no powers other than those given to it by statute. Under the Rating and Valuation Act, 1925, the duty was imposed on rating authorities of making the valuation list, and section 38 gave them an express power to employ a valuation officer and pay the expenses out of the general rate, the valuation officer being given certain powers, including that of entry.[3] All those powers have now been taken away,[4] and section 33 of the Local Government

---

[2] Local Government Act, 1933, s. 187: "(2) Except as otherwise "... provided in this section, all payments out of the general rate fund "shall be made in pursuance of an "order of the council. ... The following payments may be made out "of the general rate fund without an "order of the council ... (c) in respect "of any remuneration of ... (vi) any "other officer or person whose remuneration is payable by the council. ... (3) Any person aggrieved by "an order of the council made under "this section may appeal to the High "Court, and on any such appeal the "High Court may give such directions "in the matter as they think proper, "and the order of the High Court "shall be final."

[3] Rating and Valuation Act, 1925, s. 38 (1): "Any rating authority ... "may ... employ a competent person "to give advice or assistance in connexion with the valuation of any "hereditaments in their area, and any "person so employed shall have power, "... on production, if so required, "of authorization ... from the rating "authority ... to enter on, survey "and value any hereditament. ..."
S. 53 (4): "Any expenses incurred "under this Act by a rating authority "shall be paid out of the general "rate. ..."

[4] Local Government Act, 1948, s. 147, and Sch. 2, Pt. 2, repealed ss. 25–47 of the Rating and Valuation Act, 1925; Local Government Act, 1933, s. 307, and Sch. 11, Pt. 4, repealed s. 55 (4), which was replaced by s. 187.

Act, 1948, transferred the duties of valuing properties and preparing the valuation list to the local valuation officer, an inland revenue official. Since the coming into force of the Act of 1948 a rating authority has no power to employ, nor may it pay, an independent valuer for the purpose of altering the valuation list. Nor, by reason of the repeal of the express power given by section 38 of the Act of 1925, can a power to employ an independent valuer be implied from the right, as an aggrieved person, to make a proposal under section 40 of the Act of 1948.

[PARKER J. Do you rely on the fact that the valuer obtained information and entered premises by representing that he was acting for the rating authority?]

That is relied on. The facts show that the corporation, with the help of Isaac Dixon, was doing far more than making proposals; what it was doing amounted practically to the preparation of a new valuation list. But it was not the intention of the Act that a corporation should do that. In fact, two valuation lists were being compiled, and the ratepayers were being charged with the cost of work which Parliament had said should no longer be done by a local authority, while at the same time taxpayers were paying for the same work to be carried out by inland revenue officers.

The corporation, qua corporation, had no more power to pay the fees than it had as a rating authority; anything done by a municipal corporation beyond its statutory powers is ultra vires and the expenditure of the money, not justified by statute, was a breach of trust: see the Municipal Corporations Act, 1835; Street's Doctrine of Ultra Vires (1930), p. 62, and *Attorney-General* v. *Aspinall.*[5] In *Attorney-General* v. *Smethwick Corporation*[6] the principle in *Ashbury Railway Carriage and Iron Co.* v. *Riche*[7] was applied to municipal corporations; it is submitted that the express repeal of the power to employ a valuer shows that Parliament did not intend a corporation to enter into such a contract, and, therefore, the employment of a valuer could not be incidental to, or consequential upon, the powers and duties of the corporation within the meaning of those words as explained in *Attorney-General* v. *Great Eastern Railway Co.*[8] [Reference was also made to *Attorney-General* v. *Newcastle Corporation*[9] and *Attorney-General* v. *Manchester Corporation.*[10]]

---

[5] (1836) 2 My. & Cr. 613.

[6] [1932] 1 Ch. 562; 48 T.L.R. 227.

[7] (1875) L.R. 7 H.L. 653.

[8] (1879) 11 Ch.D. 449; (1880) 5 App.Cas. 473.

[9] (1889) 23 Q.B.D. 492.

[10] [1906] 1 Ch. 643; 22 T.L.R. 261.

[LORD GODDARD C.J. If there is power to make proposals to the valuation officer I would have thought that there was power to employ someone to give advice.]

The corporation, although still a rating authority, has no longer any function in relation to the making or alteration of valuation lists, and there was no statutory authority which entitled it to pay fees to Isaac Dixon out of the general rating fund. Section 187 of the Local Government Act, 1933, shows the payments which are to be made out of the general rating fund.

[LORD GODDARD C.J. If the corporation has power to employ him, there must be power to pay him. Why could the payments not come under section 187 (2) (*c*) (vi)?]

That must be construed as meaning payments to an officer or person employed under a contract by a corporation as a permanent part of its staff.

Harold Brown for the corporation. Although the duties of preparing and amending the valuation list have passed to the valuation officer, a rating authority is not a mere cypher but is still a live being with powers and duties: see, for example, the proviso to section 34 (1) of the Local Government Act, 1948, and also sections 35 (1) (*b*), 37, 38 (1), 39 and 41. The proposals were put forward in the name of the corporation, whose rights are preserved by section 33 (2), and which can be a person aggrieved under section 40. The main basis of its action was that it required funds to carry out their statutory duties.

[He was stopped.]

LORD GODDARD C.J. This matter which, on being opened, looked very formidable and appeared to involve the consideration of a large number of statutes and questions of law, seems to me to resolve itself into a comparatively simple point. [His Lordship referred to section 187 (3) of the Local Government Act, 1933, and continued:]

The orders appealed against were made by the appropriate members of Liverpool Corporation, directing that sums of money should be paid to a Mr. Dixon for his services to the corporation in and about the valuation of certain properties within the city for the purpose of enabling the corporation to make proposals for the revaluation of those properties in the valuation list.

It is said that a revolution in rating procedure took place by virtue of the Local Government Act, 1948; and to a certain extent that is true. There had been an earlier revolution in 1925 when the duties of overseers, and so forth, in relation to parochial rates were abolished and rating authorities were set up. In 1948 the duties of rating authorities, so far as the valuation of properties for the purpose of preparing the ordinary valuation lists was concerned, were abolished and valuation was put into the hands of the local valuation officer, who is an official of the Inland Revenue. The reason for the change is not material, but as the payment of tax under Schedule A as well as the payment of rates depends upon the valuation of various hereditaments, it was thought desirable, I suppose, that the valuation, which would be necessary for inland revenue purposes, should be done by the same person who carried out the valuation for rating purposes. Whatever the reason, the valuation list is now to be prepared by the inland revenue valuer and not by the rating authority. The rating authority in the City of Liverpool, as in other cities, remained as it was and still exists.

When the matter was governed by the Rating and Valuation Act, 1925, section 38 provided for valuation and the employment of valuers and gave power to rating authorities and other persons, namely, assessment committees or county valuation committees, to employ a competent person to give advice or assistance in connexion with the valuation of any hereditaments in the area, and it gave that person certain powers.

When the Act of 1948 came into force, that section was naturally repealed because it gave the assessment committee and the county valuation committee, both of which have now disappeared, power to employ a valuer, and also gave power to the rating authority to employ a valuer to carry out a duty which is no longer placed upon the rating authority: but Parliament has in the Local Government Act of 1948 preserved the right of the rating authority to make proposals for amendments of the valuation list, and such proposals are now made to the local valuation officer. Local valuation officers throughout the country are at present engaged, pursuant to the provisions of this Act, in revaluing the whole country; the revaluation was put off from 1952 to 1954 and now, I think, until 1956. Meanwhile, it is open to the rating authority and to other persons to make proposals for the alteration of the current valuation list, but those proposals have now to be made to the local valuation officer.

Further, the rating authority, which in this case is the Corporation of Liverpool, is itself a ratepayer, and can be a person aggrieved. The corporation can be a person aggrieved under section 40 because it may be able to say that its own property, such as the town hall and other property, is rated too high, or that other persons in the area of rating are rated too low. It seems to me, therefore, that it can make a proposal to the local valuation officer either as the rating authority or as a ratepayer in the city, and it matters not whether it describes itself as one or the other. The question is whether the corporation has a locus standi to be heard, and I do not think that it is even faintly suggested in this case that it has not. What is suggested is that it has not the power to employ and pay a valuer.

A corporation, of course, can act only through its officers and members, and if it has power to make this proposal it seems to me that to employ professional assistance must be incidental to that power. In some places there might be one or two members familiar with rating on the appropriate committee, and they might not find it necessary to employ a rating surveyor, but it is quite clear here that the City of Liverpool, as a matter of policy (and if it is within their powers it is not for us to canvass the policy) has decided that there are many office premises in Liverpool the valuation of which ought to be altered. It has, therefore, decided to make proposals, and in order to do so it appointed a person to assist it to prepare and advise it in making those proposals. That seems to me to come well within the words relating to this question of the powers of a corporation, which are conveniently stated by Lord Hanworth M.R. in *Attorney-General* v. *Smethwick Corporation*,[1] where he said,[2] referring to the well-known judgment of James L.J. in *Attorney-General* v. *Great Eastern Railway Co.*[3]: "He deals with the question of a railway company going outside its statutory powers and, perhaps for its own purposes, taking part in the business of a colliery in order to secure commodities required for the purposes of its line. He says [4]: 'So far as the first has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other.'"

Lord Hanworth M.R. continued [5]: "When that case went to the House of Lords, Lord Selborne said [6] . . . . 'But I agree with James L.J. that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized,

---

[1] [1932] 1 Ch. 562.
[2] Ibid. 576.
[3] (1879) 11 Ch.D. 449, 477.
[4] Ibid. 484.
[5] [1932] 1 Ch. 562, 576.
[6] (1880) 5 App.Cas. 473, 478.

1954

GRAINGER
v.
LIVERPOOL
CORPORATION.

Lord Goddard C.J.

" 'ought not (unless expressly prohibited) to be held, by judicial " 'construction, to be ultra vires.' Lord Blackburn also says[7]: " 'I quite agree with what James L.J. has said on this first point " 'as to prohibition, that those things which are incident to, and " 'may reasonably and properly be done under the main purpose, " 'though they may not be literally within it, would not be " 'prohibited.' "

It seems to me that the case for the corporation can be put as high as this: if it thinks that an amendment to the valuation list is required, the corporation, as the corporation interested in the fair and proper rating of the City of Liverpool, as a ratepayer and as the rating authority in Liverpool, is under a duty to see that a proposal for the amendment is made. It is not for the corporation to say whether the amendment is to be made, because that is now left to the valuation officer. I think that the corporation is under a duty if it knows that there are inequalities or under-rating or such matters, to make proposals to have them corrected. If it is either under a duty or acting in a proper exercise of its powers to do so, it seems to me that the corporation must be at liberty in such a highly technical matter as this to employ technical advice, because that is a mere incident in the performance of its various duties.

For these reasons I think that this appeal fails and must be dismissed.

BYRNE J. I agree.

PARKER J. I agree.

Appeal dismissed.

Solicitors: *Lovell, White & King; Cree, Godfrey & Wood for Town Clerk, Liverpool.*

J. F. L.

---

[7] 5 App.Cas. 481.

SOUTHGATE BOROUGH COUNCIL *v.* PARK ESTATES (SOUTHGATE) LD.

C. A.

1954
Feb. 11.

Somervell, Birkett and Romer L.JJ.

Highway—Private street works—Objection to proposals—" Insufficient " or unreasonable "—Proposed work premature—Jurisdiction of justices—Private Street Works Act, 1892 (55 *&* 56 *Vict. c.* 57), *s.* 7 (*d*). *Local Authority—Private street works—" Unreasonable."*

C. A.

1954

SOUTHGATE BOROUGH COUNCIL *v.* PARK ESTATES (SOUTHGATE) LD.

In considering objections under section 7 (*d*) of the Private Street Works Act, 1892, on the ground that proposed street works are "unreasonable," justices have power to determine that the work, although reasonable in the future, is premature, and therefore unreasonable if carried out at the time proposed.

Where, therefore, an owner of premises, shown in a provisional apportionment as liable to be charged with part of the expenses of executing certain street works, objected on the ground that, if the road were made up immediately, it would subsequently have to be cut into to provide various public utility services for new houses about to be built:—

Held, that the justices had jurisdiction to find that the proposed works were unreasonable and to quash the apportionment.

Sheffield Corporation v. *Anderson* (1894) 64 L.J.M.C. and *Mansfield Corporation* v. *Butterworth* [1898] 2 Q.B. 274; 14 T.L.R. 431 applied.

Decision of Divisional Court [1953] 1 W.L.R. 1274 affirmed.

APPEAL from Divisional Court (Lord Goddard C.J., Sellers and Havers JJ.).

By a resolution dated July 31, 1951, Southgate Borough Council resolved to execute street works at Seafield Road, Southgate, pursuant to section 6 of the Private Street Works Act, 1892. On November 27, 1951, the council resolved to approve the specification of the works, and the plans, sections, estimate of probable expenses and the provisional apportionment of those expenses. Park Estates (Southgate) Ld. were the owners of premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works. Part of the premises consisted of vacant land on which they wished to build houses. The approximate cost of making up the road would be £6,000, of which they would be liable to pay as frontagers about £3,000 in respect of all the premises owned by them. A very light form of construction was proposed.

On May 2, 1952, the objections which the company made under section 7 (*d*) of the Act of 1892 [1] to the council's proposals were dismissed by a court of summary jurisdiction, and on May 21 the council, acting as agents for the local planning authority, refused the company permission to develop the land by the erection thereon of forty-six dwelling-houses.

---

[1] Private Street Works Act, 1892, s. 7: "During [one month from the "date of the first publication] any "owner of any premises shown in a "provisional apportionment as liable "to be charged with any part of the "expenses of executing the works "may, . . . object to the proposals of "the urban authority on any of the "following grounds; . . . (*d*) That the "proposed works are insufficient or "unreasonable, or that the estimated "expenses are excessive."

C. A.
1954

SOUTHGATE BOROUGH COUNCIL
v.
PARK ESTATES (SOUTHGATE) LD.

The company appealed to quarter sessions from the decision of the court of summary jurisdiction, contending that the council's proposal to make up Seafield Road was premature, and that in the event of the Minister of Housing and Local Government allowing an appeal which the respondents proposed against the council's refusal to grant permission to develop the vacant land, then the road as made up would have to be cut into to provide the various public utility services for the new houses. Further, having regard to the light surface proposed, the road would be churned up during the building operations, and for that reason also the work was "insufficient" within section 7 (*d*). The company also contended that the council were not making a bona fide exercise of their powers under the Act of 1892 in requiring the company to pay approximately £3,000 towards making up the road on land which the council had refused to allow to be developed.

Quarter sessions found that the works were premature and therefore unreasonable within the meaning of section 7 (*d*), and ordered the plans, specifications, estimates and provisional apportionments to be quashed.

The borough council appealed to the Divisional Court, contending that the justices had no power to determine that the proposed work although reasonable in the future, was unreasonable if carried out at the time proposed, because it was premature. The Divisional Court held that the justices had jurisdiction to find that the proposed works were unreasonable.

The borough council further appealed. It was stated that the company's appeal from the refusal of the borough council to permit development of the land had been allowed by the Minister of Housing and Local Government.

J. Ramsay Willis and *Christopher Hodson* for the borough council.

Desmond Ackner for Park Estates (Southgate) Ld. was not called upon for argument.

The argument for the appellant council sufficiently appears in the judgments.

SOMERVELL L.J. stated the facts, read the contentions of the company and the opinion of quarter sessions, and continued: Mr. Willis, on behalf of the local authority, suggested that if the decision of quarter sessions stood (and the Divisional Court has held that it was right) it would justify interference by the

C. A.
1954

SOUTHGATE BOROUGH COUNCIL
v.
PARK ESTATES (SOUTHGATE) LD.

Somervell L.J.

justices in matters of procedure, and so on, which Parliament must have intended to leave to the local authority. In particular, he said, if they can decide on unreasonableness because the work is premature, that would indicate that they could dictate to the local authority the precise times at which they could undertake the various works which, pursuant to their statutory duties, they decide to undertake. I do not take that view, but I would criticize the word " therefore " in the opinion of quarter sessions. I think that it would be more accurate to say: " the said works " were premature and were in the circumstances unreasonable."

The facts here seem to be of a very special character. The only thing which prevented further building on this estate in the near future was the provisional planning scheme. By the time the matter came to quarter sessions the company had expressed their intention to appeal against a decision in accordance with that scheme. We are told that the appeal has been successful and that they are to be allowed to put up the houses which they desire to build. It was, therefore, a case in which there was a real possibility of further housing development within a short time. As I read the case the local authority, perhaps unwisely, were not expressing the intention of postponing any action until that matter had been cleared up. Quarter sessions interpreted what was said to them as evidencing an intention to go on whatever happened. For those reasons the money would, on the findings, be wasted on the assumption that the appeal was successful and leave was given, and the heavy traffic involved in building new houses went on the road as so constructed. I am bound to say that, on the face of it, it would have been difficult to think of anything less reasonable than to spend a lot of money in one year in work on a road which would possibly be largely destroyed by the following year. Therefore, unless some authority constrains me to hold that that is a matter outside the jurisdiction of the justices, it seems to me, on the ordinary meaning of the word, to be precisely the type of waste of money against which frontagers who are going to be asked to pay ought to be, and under the Act are, entitled to protest.

I think that the question of construction is settled, so far as this court is concerned, by *Sheffield Corporation* v. *Anderson.*[1] The headnote reads: " A court of summary jurisdiction, upon " the hearing of a frontager's objection to a private street work " under section 53 (*d*) and section 54 of the Sheffield Corporation

---

[1] (1894) 64 L.J.M.C. 44.

"Act, 1890, and semble under section 7 (*d*) and section 8 of "the Private Street Works Act, 1892, has jurisdiction, when "determining whether the proposed work, as for instance "sewering a street, is itself unreasonable, to take into con-"sideration the existing state of the drainage of the houses "in such street." Mr. Willis agreed that the words in the Act which were being construed were to all intents and purposes the same as those we have to construe. The sewering concerned was part of a wider scheme which contained a lot of other matters. I asked Mr. Willis, therefore, whether he felt that that was relevant, that is to say, whether if the matter which the justices were considering had been the only point in the scheme, that would have made a difference to their jurisdiction. He said, quite rightly, that he did not make that suggestion. The points which Mr. Willis took in his argument seem to me to have been taken in substance in argument in the *Sheffield* case[1] and rejected by this court. There is this further point: that whether there should be a particular drain in a street is very much the type of matter which primarily it is for the local authority to consider. But here is a decision of this court that justices are entitled to consider in certain circumstances whether that work is or is not reasonable. Lord Esher M.R. said[2]: "If he meant by this special case to ask "the court whether, in considering whether the resolution is "reasonable or not, he has the right to take into consideration "the existing state of the drainage of these houses, I have no "difficulty in saying that he has." Lopes L.J. said[3]: "To my "mind, that section entitles the magistrate, for the protection "of frontagers, to say that the proposed works are unreasonable, "and that is all that he has done in this case."

The Divisional Court relied, perhaps, rather less on the decision in that case than on the statement by Wills J. in *Mansfield Corporation* v. *Butterworth*,[4] where he said: "The word 'unreason-"'able' has undoubtedly a wider meaning, and I think that it "does give the justices jurisdiction to say whether, having regard "to the scheme as a whole, it is reasonable or not that the pro-"posed works should be done at all." I think that both natural principles of construction and the authorities to which I have referred clearly indicate that the limitations which it is sought to place on this word are not to be accepted. On the wider construction, I have no doubt at all that quarter sessions in the special circumstances which existed at the time in this case were justified in coming to the conclusion which they did. I would only like, in conclusion, to emphasize that I think that the circumstances were special ones. I am not suggesting that there may not be matters which the justices ought properly to regard as outside their jurisdiction under this section. The circumstances here are special, and in my opinion this appeal should be dismissed.

---

[1] 64 L.J.M.C. 44.

[2] Ibid. 47.

[3] Ibid. 48.

[4] [1898] 2 Q.B. 274, 282; 14 T.L.R. 431.

BIRKETT L.J. I am of the same opinion. I would like to emphasize that I think that the facts in this case are of a highly unusual kind, so much so that a very remarkable happening took place when the case came before the Divisional Court. When it originally came before that court the position was that quarter sessions had allowed the appeal and the work in consequence had been stopped. The Park Estates Co. had by that time heard that the Minister of Housing had allowed their appeal, and it was open to them to build and they were proposing to do so. The Divisional Court thought that it would be absurd to hear this case on that very unusual state of affairs. They therefore adjourned the matter for six months. They did it upon this ground, quoting from Lord Goddard C.J.,[5] that it seemed to the "court that if the building was going on, it was obvious that "this work might very easily be entirely thrown away, and "that work which would have to be done if the street became "a street with houses on both sides would be very different "from what was required when there were only a few houses "there. We adjourned the case in the hope that there would "be some settlement between the parties. By a series of mis-"fortunes, however, the work has not yet been started." I merely cite that to show that the facts in this case are of a highly unusual kind. Lord Goddard C.J. was clearly impressed by the considerations put forward by Mr. Willis, as, indeed, I think this court was impressed. I can see how very important it is to a local authority that their powers should not be cut down in any way which makes their work less effective, unless there is clear ground and clear authority by which it can be done. Lord Goddard C.J. clearly was most impressed by those considerations and said that in certain circumstances he would like to consider the matter more fully, but he felt that he was bound by the authorities which my Lord has cited today, particularly *Mansfield Corporation* v. *Butterworth*,[6] and also *Sheffield Corporation* v. *Anderson*.[7] For myself, looking at the words in section 7, "that the proposed works are . . . "unreasonable," and giving a proper meaning to them, I think that if the facts show, as they do show here, that to do the work might result in £6,000 being expended, £3,000 of which would have to be paid by the respondents, and that that was to be entirely thrown away, it was then open to the justices to say that it was unreasonable. For that reason I would support the judgment of the Divisional Court and of my Lord. I agree that this appeal ought to be dismissed.

---

[5] [1953] 1 W.L.R. 1276.

ROMER L.J. I agree. I only wish to say a few words about the construction of section 7 of the Private Street Works Act, 1892. As I understood it, Mr. Willis, for the borough council, contended that in paragraph (*d*) of that section the word "unreasonable" was intended to be used in contradistinction to the word "insufficient" which precedes it, and to bear a meaning which is the very opposite of "insufficient"; in other words, that it was intended to mean "superfluous." That is not the language which the legislature has used. If that had been the intention of the legislature it would have been very easy to say "insufficient or excessive" or "insufficient or "unnecessary," or something of that kind. But they have not used either of those words; they have used the word "unreasonable."

As a mere matter of construction I think that "unreasonable" here means unreasonable on any other ground than that of insufficiency, because it might well be said that works which were insufficient were unreasonable because of their insufficiency. Therefore I think that the word "unreasonable" there means unreasonable on any ground other than insufficiency, coupled possibly with the further exception of unreasonableness on the ground of undue lavishness of expenditure. I say that because of the final words in paragraph (*d*), "or that the estimated "expenses are excessive." I think that the wide meaning of "unreasonable" in that section which I have suggested not only emerges from the construction of the section itself but is supported by the language of Wills J. to which my Lord referred in *Mansfield Corporation* v. *Butterworth*.[8] In his judgment in that case he first of all referred to insufficiency and said[9]: "I

---

[6] [1898] 2 Q.B. 274.
[7] 64 L.J.M.C. 44.
[8] [1898] 2 Q.B. 274.
[9] Ibid. 281.

"think 'insufficient' means that the specified works are "insufficient to carry out the purpose which is proposed to be "effected by them." Then he turned to the word "unreasonable" and said [10]: "The word 'unreasonable' has undoubtedly "a wider meaning, and I think that it does give the justices "jurisdiction to say whether, having regard to the scheme as a "whole, it is reasonable or not that the proposed works should "be done at all." It appears to me to be impossible to accept the suggested meaning of the word "unreasonable" without running counter to those observations of Wills J. which I respectfully think were right, and also without running counter to the decision of this court in *Sheffield Corporation* v. *Anderson.*[11]

Once one escapes, as I think one does, from this narrow interpretation of the word "unreasonable," one is entitled to attach to it the meaning which it ordinarily bears and which is a meaning of considerable scope. Certainly, in my opinion, it is wide enough to justify the view that the justices may reject any proposed works on the ground that it is not reasonable that they should be carried out at the present time, whatever the position may be in the future. If so, there can be no doubt that in the circumstances of this case quarter sessions could not have arrived at any other conclusion than that from which this appeal is brought. To spend £6,000 on a road which might be smashed up entirely at any time in the near future, the company having been given the liberty to develop for which they appealed to the Minister, seems to me to be just about as profound a waste of money as the human mind is capable of conceiving. For these reasons, and for those which my brethren have given, I agree that the appeal should be dismissed.

Appeal dismissed with costs.
Leave to appeal to the House of Lords refused.

Solicitors: *Gordon H. Taylor, Town Clerk; Rawlinson & Son*

A. W. G.

---

[10] [1898] 2 Q.B. 282.

[11] 64 L.J.M.C. 44.

CAVE *v.* CAPEL.

C. A.

[1953 C. No. 1986.]

1954
Jan. 25, 26, 27.

Somervell and Birkett L.JJ. and Upjohn J.

Execution — Sheriff — Summons for protection — Seizure of caravan — Plaintiff inside—Claim to caravan by third party—Claim admitted by judgment creditor—Notice of admission given by sheriff's officer —Withdrawal of sheriff — Action in trespass — R.S.C., Ord. 57, *r.* 16A.

Sheriff—Execution—Summons for protection.

A sheriff who wrongfully, by error, seizes property which does not belong to the judgment debtor, and withdraws on receiving notice of the judgment creditor's admission of the claim of a third party to the property, will be given protection under R.S.C., Ord. 57, r. 16A, from any action which could only result in nominal damages, but the court will not grant him protection under the rule where it is apparent that the claimant has a real grievance.

Thus, where a sheriff's officer seized a caravan, the property of a third party, erroneously believing it to belong to the judgment debtor, and removed it, with the judgment debtor's mother inside, to the judgment creditor's farm and locked it in a barn, the court refused the sheriff protection under rule 16A from an action by the mother.

Smith v. *Critchfield* (1885) 14 Q.B.D. 873, 878, 881; 1 T.L.R. 421 distinguished.

Decision of Ormerod J. [1953] 1 W.L.R. 1185; [1953] 2 All E.R. 929 reversed.

APPEAL from Ormerod J.[1]

The defendant, Air Vice-Marshal Arthur John Capel, was at the material time High Sheriff of the county of Somerset. On October 29, 1952, a bailiff, William Hext, acting as sheriff's officer, in pursuance of two warrants was instructed to levy execution on the goods of one A. H. Cave in respect of two judgments for a total sum of £364 10s. 3d. The bailiff proceeded to the address of the judgment debtor at Rode Common, Somerset, and found there no property, other than a caravan, on which to levy execution. In the caravan was residing the plaintiff, Mrs. May Finella Cave, the mother of the judgment debtor, who asserted that the caravan was not the property of her son. She refused to say whose property it was and refused to leave it. The bailiff, after inquiries, eventually satisfied himself that it was his duty to levy execution on the caravan, and on October 30, 1952, a trailer was supplied by the judgment creditor and the caravan, with Mrs. Cave inside it, was taken to the judgment creditor's farm, and there locked in a barn.

---

[1] [1953] 1 W.L.R. 1185; [1953] 2 All E.R. 929.

A small door in the barn was left unlocked and open, and Mrs. Cave was able to leave the barn and eventually did so.

On October 31 a Mrs. Carr, or her solicitors, notified the bailiff that she was the owner of the caravan, and the sheriff was instructed by the judgment creditor to withdraw from possession of the caravan, and did so. On April 24, 1953, the plaintiff issued a writ against the sheriff claiming damages for wrongful execution, wrongful imprisonment and trespass against the person. The sheriff thereupon took out a summons under Ord. 57, r. 16A,[2] claiming protection from any action in respect of the said seizure and possession of the goods.

On June 30, 1953, Master Harwood refused to make the protection order, but extended the time for entering a defence to the action. On appeal to him in chambers Ormerod J. granted the order, holding (1) that the seizure of the caravan and the trespass to the plaintiff must be regarded as one and the same act and rule 16A applied; and (2) that the sheriff was entitled to protection not merely from an action brought by the claimant to the goods, but from an action such as the present.

The plaintiff appealed.

James Stirling for the plaintiff.
E. S. Fay for the defendant.

The arguments sufficiently appear in the judgments. The following cases were referred to: *Winter* v. *Bartholomew*[3]; *London, Chatham and Dover Railway Co.* v. *Cable*[4]; *Smith* v. *Critchfield*[5]; *De Coppett* v. *Barnett*[6]; *Moore* v. *Hawkins*[7]; *Salberg* v. *Morris*[8]; *Lewis* v. *Jones*.[9]

Somervell L.J. stated the facts and continued: The proceedings by the plaintiff having started, the defendant sheriff applied for protection under Ord. 57, r. 16A. The first Act to which we were referred which protected sheriffs was the Interpleader Act, 1831. That Act enabled sheriffs to take advantage of the interpleader procedure and its provisions are now substantially reproduced in R.S.C., Ord. 57. As was pointed out, quite rightly, by Mr. Fay, for the sheriff, there are two aspects of interpleader proceedings. They enable the issue as to title between two contending parties to be conveniently tried, and they also give protection in the ordinary case to someone who is in the position of a stakeholder and who claims no interest in the goods himself. If proceedings have been started against him it enables him, in a proper case, to get them stayed, or the order may prevent proceedings being taken against him. Indeed, Ord. 57 emphasizes that aspect of the matter by starting with the words "Relief by way of interpleader may be granted." Rule 1 in that Order provides: "Relief by way of interpleader may be "granted . . . (b) Where the applicant is a sheriff or other officer "charged with the execution of process by or under the authority "of the High Court, and claim is made to any money, goods, or "chattels taken or intended to be taken in execution under any "process, or to the proceeds or value of any such goods or chattels "by any person other than the person against whom the process "is issued."

---

[2] R.S.C., Ord. 57, r. 16A: "When "the execution creditor has given "notice to the sheriff or his officer "that he admits the claim of the "claimant, the sheriff may there-"upon withdraw from possession of "the goods claimed, and may apply "for an order protecting him from "any action in respect of the said "seizure and possession of the said "goods, and the judge or master may "make any such order as may be "just and reasonable in respect of "the same: Provided always that the "claimant shall receive notice of such "intended application, and, if he "desires it, may attend the hearing "of the same, and if he attend, the "judge or master may, in and for the "purposes of such application, make "all such orders as to costs as may "be just and reasonable."

[3] (1856) 11 Ex. 704.

[4] (1899) 80 L.T. 119.

[5] (1885) 14 Q.B.D. 873; 1 T.L.R. 421.

[6] (1901) 17 T.L.R. 273.

[7] (1894) 43 W.R. 235.

[8] (1887) 4 T.L.R. 47.

[9] (1836) 2 M. & W. 203.

That being the position, and there being an intention that, at any rate in certain cases, a sheriff should get relief, in 1895 *Moore* v. *Hawkins*[1] came before the court. In that case the sheriff had seized goods. There had then been a claim and he was notified of it. The execution creditor had admitted the claim of the claimant and the sheriff had withdrawn from possession. Apart from that, it was a perfectly ordinary case of the type in which, I think, relief would have been given if the interpleader procedure had been applicable. But the court held that as he had withdrawn from possession the procedure was inapplicable; it could not protect him. He had not got, as it were, the corpus, which was the foundation of interpleader relief, which normally an applicant is agreeing to hold at the disposal of the court. Both Pollock B. and Grantham J. decided that that was the position. The sheriff having elected to withdraw his execution the whole thing was at an end. The right to take steps for his own protection, which he might have done had he remained in possession, had gone.

---

[1] (1894) 43 W.R. 235.

It was obviously thought—and there is no dispute about this—that that was an anomaly; that where an execution creditor is satisfied and the sheriff at once takes the proper course of withdrawing from possession, he ought to be able to get protection if it were the type of case in which he would have had protection had he interpleaded in the ordinary way. Therefore, as a consequence of that case, there was added to Ord. 57, r. 16A, with which we are here concerned, because the sheriff in the present case withdrew from possession. [His Lordship read rule 16A and continued:] At the same time, we were told, words were inserted in rule 2 (*c*) to cover rule 16A. Rule 2 provides: "The applicant must satisfy the court or a judge by affidavit or "otherwise,—(*c*) That the applicant, except where he is a sheriff "or other officer charged with the execution of process by or "under the authority of the High Court who has seized goods "and who has withdrawn from possession in consequence of the "execution creditor admitting the claim of the claimant under "rule 16 of this Order, is willing to pay or transfer the subject-"matter into court or to dispose of it as the court or a judge "may direct."

Mr. Fay said, and I agree with his submission, that the wording in rule 2 (*c*) indicates that an applicant under rule 16A is regarded as an applicant within the Order. Of course, the special conditions as provided by rule 16A have to be satisfied, but he is a type of applicant for relief under the Order. There is no dispute between counsel, and I think that they were both clearly right in admitting that the type of case in which relief would be given under the normal interpleader procedure is the type in which it would be given under rule 16A. If one came to the conclusion that relief would not have been given if the sheriff had been in a position to interplead, one would not give it under rule 16A, and vice versa.

It was at one time suggested by the plaintiff that as she was not the owner but the occupier, and Mrs. Carr was the owner, the plaintiff could not be regarded as the claimant within rule 16A. I agree that she did not formally write a letter, or so it appears, but her claim was clearly a claim under Mrs. Carr. She was saying that she occupied in virtue of a contract which she had with Mrs. Carr, and I have no doubt that Mrs. Carr wrote at her instigation, and it seems to me that she was right, in the circumstances, to communicate with Mrs. Carr. I think, so far as that is concerned, that the sheriff was in order in saying that

that condition of this rule had been satisfied and the plaintiff was a claimant.

The first case to which we were referred, which indicates the circumstances in which protection would be given in the normal interpleader case, was *Winter* v. *Bartholomew*,[2] but I can refer straight away to *Smith* v. *Critchfield* [3] in which the earlier case was considered by the court. The point which arose in *Smith* v. *Critchfield* [3] was whether protection could be given against an action for trespass, the trespass being a mere trespass incidental and necessary to the seizure, the seizure obviously being the main matter of complaint. It was held by the court: "Where "the sheriff in the execution of a fi. fa. enters the premises "of a person other than the execution debtor and there seizes "goods believing erroneously that such goods belong to the "execution debtor, the sheriff may, upon interpleader proceed-"ings, be protected against an action for trespass to the land "as well as against an action for seizure of the goods, if no "substantial grievance has been done to the person whose "premises are wrongfully entered." It is clear from the judgment that those last words are not meant to qualify solely the protection against trespass but are necessary if relief is to be given at all.

Brett M.R. said [4]: "It is not, of course, in every case that "the judge will protect the sheriff. He will be protected when "he has only made an honest mistake in executing the process "of the court, and but for such mistake everything that he has "done would have been justified by the writ." He went on to consider whether the sheriff was to be protected against a necessary trespass as well as the seizure, and then he said [5]: "It seems "to me that the sheriff is entitled to protection in respect of the "whole of the act which through error he has wrongfully done "under the writ, that is, in respect of his having entered the "house and seized the goods." Then he referred to *Winter* v. *Bartholomew*,[6] approved what was said there, and put it in his own words [7]: ". . . it is said that the sheriff may be "protected in such a case as this in respect both of the trespass "to the land and that to the goods where no real grievance has "been sustained by the claimant. It is obvious that that cannot "mean where there is no legal wrong, because by the hypothesis "a tortious act must have been committed. It is clear,

[2] (1856) 11 Ex. 704.

[3] (1885) 14 Q.B.D. 873; 1 T.L.R. 421.

[4] Ibid. 878.

[5] Ibid. 878.

[6] 11 Ex. 704.

[7] 14 Q.B.D. 873, 878.

"therefore, that by 'no real grievance' is meant no substantial "grievance beyond the mere entry and seizure of the goods, such "as might exist if the sheriff's officer were guilty of insolent or "oppressive conduct in excess of his duty, and not justified by "the writ."

Then Bowen L.J. referred to *Winter* v. *Bartholomew*,[8] and he reiterated the phrase "no substantial grievance." He then quoted Platt B. in that case and said[9]: "Baron Platt said that "the 6th section of the Act authorized the judge to make such "decision as should appear to be just according to the circumstances of the case, and that nothing could be more just than "to prevent the sheriff being harassed by an action in which no "more than nominal damages could be recovered." Then again, "If indeed the sheriff in the execution of the writ has committed "any real grievance the court will allow the injured party to "bring an action, but if he has done no real wrong the court "will stay proceedings against him."

One has an example in *De Coppett* v. *Barnett*[10] of a case where it was held that the sheriff was not entitled to protection where a substantial grievance had been done. I agree that in one sense, at any rate, the extent of the grievance, and in some cases its existence, must depend on the decision as to the issues raised in the action; but on what is admitted here it seems to me that this case is wholly outside the type of case for which the rule was contemplated. It is quite sufficient, in my opinion, to decide the case, to state what I have already stated, namely, that on the defendant's own affidavit the caravan which the plaintiff rightfully occupied under a contract with the real owner was removed from the site where she had it and was put in a barn, the main door of which was kept locked, for four days. No one can say that that was not a real grievance.

It was suggested that we might consider adjourning the application for protection under this Order until the trial, so that the judge, presumably, having heard the case might then say: "Having heard all I have now heard, I think that this is a case "under which protection might have been given." As a matter of procedure, I do not think that that is right. I am not deciding that in no circumstances could an issue be ordered to be tried under this rule. That can be determined if the need arises. In my view, the rule is intended to apply in cases where, on the evidence before the court, it is clear that protection should be given before a trial and the investigation which a trial involves. It is rather absurd to suggest that a rule which is intended to be used to stop a trial can, as it were, be kept in a state of suspense until the trial has been concluded, and then relied on for some purpose as to the order to be drawn up on costs. That does not appeal to me, but for the reasons which I have given, and I hope that I have said nothing which in any way would prejudge the issues which may arise, I do not think that this is a case for this order.

---

[8] 11 Ex. 704.

[9] 14 Q.B.D. 873, 881.

[10] (1901) 17 T.L.R. 273.

The master took the view which I have taken, and he made no order, except that the time for the defence was extended for 14 days. The judge made an order that the " appeal be allowed " and that the defendant be given protection against the claim " of the plaintiff pursuant to the provisions of Ord. 57, r. 16A " and that all further proceedings herein be stayed." Mr. Fay, for the sheriff, said that he did not submit to the judge that any such order could be made at that stage. He submitted that there must be an issue to determine certain facts. No doubt there may have been a misunderstanding. The matter became clearer before us, but Mr. Fay did not seek to support the order in that form. He agreed that there being a dispute between the affidavit and the statement of claim there must be an issue. For the reasons which I have given I think that the master's order should be restored.

BIRKETT L.J. I am of the same opinion, and there is very little that I need to add. But as we are differing from Ormerod J. perhaps it would be well if I said a few sentences supporting the view which my Lord has already put forward. I, too, would hope that nothing that I say would affect, in view of our decision, the hearing of this case when it comes on in due course.

The facts were, admittedly, most unusual. They had never occurred in this kind of combination before, and I should think that they are most unlikely to recur in the future. But it happened that the plaintiff made her home in this caravan which was the subject-matter of a dispute. Making her claim to be undisturbed, nevertheless the caravan, which contained her belongings and herself, was carried away from the judgment debtor's premises to the judgment creditor's premises for a day, and put into a barn, where the plaintiff was kept in a state of some humiliation. It is impossible to say upon those facts that this was the ordinary case to which Ord. 57, r. 16A, was intended to apply. On any view of the case the plaintiff had a real

C. A.
1954

CAVE
v.
CAPEL.

Birkett L.J.

grievance, and quite a substantial grievance. As I read Ord. 57, r. 16A, it was designed to protect a sheriff in what I may call the ordinary circumstances, the almost inevitable circumstances which are bound to arise in the course of the sheriff's duty.

It is almost inevitable, human nature being what it is, that a sheriff would seize goods which ultimately turned out to belong to another claimant. Under the Order, as I understand it, when the execution creditor has admitted the claim, "the sheriff may "thereupon withdraw from possession of the goods claimed, and "may apply for an order protecting him from any action in "respect of the said seizure and possession of the said goods, "and the judge or master may make any such order as may be "just and reasonable in respect of the same." I understand that to mean that where the facts are that the sheriff has, in fact, seized goods in the name of the judgment creditor which in truth belong to another claimant, there would, in the ordinary way, be a cause of action against him at least for nominal damages. The design of this regulation, in my view, is to provide that in those circumstances it is proper that the sheriff should be protected. But in *Smith* v. *Critchfield* [11] Brett M.R. said that it was not in every case that the judge would protect the sheriff. It would depend upon the facts of the particular case.

I think that Ormerod J. was unduly influenced by the decision in *Smith* v. *Critchfield*.[11] That was a case where one would have said that if the sheriff had, in fact, wrongfully seized goods he must have entered on the land in order to do so. Brett M.R. was saying: "You cannot separate the two things like that; they "are really one and indivisible; they are all part of the same "thing." Looking back at this distance of time one sees the common sense and the reason of it.

What Ormerod J. did was to say: "In this case there can "be no separation: if you find that the sheriff has in fact seized "goods"—in this case, the caravan—"you cannot separate that "from the taking away of the plaintiff inside the caravan to the "land of the judgment creditor." Indeed, he said, after some consideration: "I have come to the conclusion that the words "of the rule must be taken to mean what on the face of them "they do mean, that the sheriff is entitled to apply for an order "protecting him from any action in respect of the said seizure "and not merely from any action in respect of the said seizure

---

[11] 14 Q.B.D. 873.

"which may be brought by the claimant." As I think, the Order was intended to apply to the case which I have named, that in which there was admittedly a cause of action because of a mistaken seizure by the sheriff, in which no doubt nominal damages could be awarded; it was said in those cases that the sheriff would be protected. But where, as in the present case, there was indeed a substantial grievance, I do not think that this rule applies. Therefore, for the reasons which have been given by my Lord I am entirely of the same opinion and I think that the order of the master ought to be restored.

UPJOHN J. I agree. Order 57, r. 16A, confers upon the court a valuable discretionary power to protect sheriffs who have wrongfully seized goods under a writ of fi. fa. The order which the court may make is "such order as may be just and reasonable." That is the test which we have to apply. In my judgment those words mean that the order must be just and reasonable not only from the point of view of the sheriff, but of the claimant, in this case the plaintiff. It may well be just and reasonable to make an order in the ordinary case where the plaintiff or claimant has suffered no real grievance and whose only claim is for nominal damages. I do not propose to refer to the facts, but it is clear that this is not the ordinary case, and in my judgment it would be neither just nor reasonable to preclude the plaintiff in this case from pursuing such remedies at law as she may have against the defendant. I agree that the order of the master should be restored.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.; Church, Adams, Tatham & Co.*

A. W. G.

VINALL *v.* HOWARD.

[1952 V. No. 411.]

C. A.
1954
Jan. 27.

Somervell and Birkett L.JJ. and Upjohn J.

Contract—Illegality—Road traffic—Sale of motor-vehicle—Mechanical defects—"Not fit for use on the road"—Whether sale unlawful—Defects in construction and equipment—Defects in use and maintenance—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 3 (1)—*Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 8 (1)—*Motor Vehicles (Construction and Use) Regulations,* 1951 (*S.I.* 1951, *No.* 2101).

Road Traffic—Sale of motor vehicle—Construction and use.

The plaintiff sold to the defendant a second-hand motor-car of which the speedometer and foot brake were defective, and he informed the defendant of those facts. After payment by cheque the defendant discovered that the silencer was defective and the chassis was fractured, and as the plaintiff was unwilling to take back the vehicle the defendant stopped the cheque. In an action by the plaintiff on the cheque the defendant pleaded that the sale was unlawful under section 8 of the Road Traffic Act, 1934, being in breach of section 3 of the Road Traffic Act of 1930:—

Held, that since section 3 of the Act of 1930[1] applied only to the construction and equipment of vehicles and not to their use and maintenance, and, therefore, the defects complained of, which indicated a failure to keep and maintain in good working order, were outside the subject-matter of section 3, the contract was not rendered unlawful by section 8 of the Act of 1934,[2] and the plaintiff was entitled to judgment.

Decision of Streatfeild J. [1953] 1 W.L.R. 987; [1953] 2 All E.R. 515 reversed.

APPEAL from Streatfeild J.[3]

In February, 1952, the plaintiff, Thomas Washington Vinall, advertised for sale a Morris 8 h.p. saloon motor-car. The defendant, Henry Thomas Howard, replied to the advertisement and the plaintiff arranged to drive the car round to the defendant's house. When the parties met, the plaintiff pointed out certain defects in the foot brake of the car and in a short drive the defendant noticed that the speedometer needed a new cable. The plaintiff explained that he had a spare in the car, but had not had time to fix it. The defendant agreed to buy the car for £310 and gave the plaintiff a cheque for that sum. On examining the car by daylight on the following day the defendant found that the chassis was fractured and the silencer was defective. He accordingly stopped the cheque and by telephone told the plaintiff that the car was not roadworthy. The plaintiff refused to cancel the contract, and after he presented the cheque and found that it was dishonoured he commenced the present action on the cheque or, alternatively, for the price of the car. By his defence the defendant pleaded, inter alia, that in selling or agreeing to sell the car the plaintiff was in breach of section 8 of the Road Traffic Act, 1934, in that the condition of the car was such that its use on the road was unlawful by virtue of the provisions of section 3 of the Road Traffic Act, 1930, and several of the regulations contained in the Motor Vehicles (Construction and Use) Regulations, 1951.

---

[1] Road Traffic Act, 1930, s. 3 (1): "Subject as hereinafter provided, it "shall not be lawful, to use on any "road a motor-vehicle . . . which does "not comply with the regulations "applicable to the class or description "of vehicles to which the vehicle "belongs, as to the construction, "weight and equipment thereof."

[2] Road Traffic Act, 1934, s. 8 (1): "Subject to the provisions of this "section it shall not be lawful to sell ". . . a motor-vehicle . . . in such a "condition that the use thereof on "a road in that condition would be "unlawful by virtue of the provisions "of section 3 of the principal Act."

Subs. (4): "A person shall not be "convicted for an offence under this "section in respect of the sale . . . "of a motor-vehicle . . . if he proves ". . . that he had reasonable cause to "believe that the vehicle . . . would "not be used on a road in Great "Britain, or would not be so used "until it had been put into a condi"tion in which it might lawfully be "so used."

[3] [1953] 1 W.L.R. 987; [1953] 2 All E.R. 515.

On June 29, 1953, Streatfeild J. dismissed the claim, holding that the sale was unlawful.

The plaintiff appealed.

Guy Aldous and *J. B. Elton* for the plaintiff. If the decision of the judge is right, then if an owner has failed to maintain his car it would be illegal for him to sell it, and the purchaser, having stopped payment on the cheque, could keep the car, because the law will not help the vendor to recover it. The vendor could not sue in conversion because there was a contract.

[UPJOHN J. If he got cash then he would be all right.]

The judge took the view that section 3 of the Road Traffic Act, 1930, was directed to preventing any unroadworthy vehicle being used on the road. It is contended that the purpose of that section is concerned with the construction and equipment of certain types of vehicles and is not directed to the question whether vehicles have to be maintained on the road in a proper condition. The first question for the court is whether section 3 provides that vehicles can only be used on the road when in a roadworthy condition, or is it directed to seeing that vehicles are made in accordance with certain types and equipped with proper equipment. Section 3 is one of a trilogy of sections to which the sidenote is "classification of vehicles." Section 30 empowers the Minister to make regulations generally as to the use of motor-vehicles and the conditions under which they can be used. It is directed not only to section 3 but generally. The Minister is also empowered to make regulations as to user, which do not relate to section 3. One is only in breach of section 3 if one sells a motor-car which has not a particular type of equipment. The construction and equipment regulations are only directed against manufacturers. If it had been intended to make unlawful the sale of a car which was not in a roadworthy condition it should have stated that specifically; but it is submitted that section 8

C. A.
1954

VINALL
v.
HOWARD.

of the Road Traffic Act, 1934, with section 3 of the Act of 1930, applies only to sales of cars of unlawful types.

John Gazdar for the defendant. Counsel for the plaintiff is saying, in effect, that provided initially, when manufactured, a car complies with the regulations, what happens afterwards is immaterial if the equipment is still there, though defective from use. If he is right, then it is necessary to read into the regulations some such word as "initially." It is submitted that the word "construction" is material at all times and not initially, and that the regulations are drafted on that basis. So, also, the word "equipment" must be treated as at the time of user and not at the time of provision. If the vehicle is in any respect not properly constructed at the time of user, section 3 applies to it. Regulation 46 refers to equipment and, if it means equipped at any time, it applies to section 3. If the plaintiff is right, then in future any person who is prosecuted for not having a driving mirror, or having a defective mirror, could say that it comes under "construction" and that no offence has been committed.

[SOMERVELL L.J. I do not accept the argument that nothing matters after construction. I think that if equipment was subsequently removed from the car section 3 would apply.]

It is submitted that the regulations were made by the Minister partly in order to lay down standards for manufacturers and partly in the interests of the public. If the legislature decided that manufacturers must conform to certain standards of construction and equipment, then, it is submitted, the legislature would also require that dealers and others who sold motor-cars should conform to standards, and that throughout the life of a car those requirements should continue.

[The following cases were referred to in argument: *Harding* v. *Price*[4]; *Scarfe* v. *Morgan*[5]; *Keeble* v. *Miller*.[6]]

SOMERVELL L.J. This is an appeal from a decision of Streatfeild J. It seems reasonably clear from the judgment that the form in which the argument has been addressed to us by counsel for the plaintiff was not the same as that addressed to the judge. The case arises out of an agreement to sell a motor-car. The plaintiff was the seller and the defendant was the purchaser. On the judge's finding an agreement was concluded, the defendant took the car away and he sent a cheque. During the discussion which led up to the sale certain defects were referred to and pointed out by the plaintiff. There was another defect, with which we are concerned, which was unknown to the plaintiff, and also a further and most important defect, namely, that the chassis was fractured, which was discovered by the defendant after he had taken the car. He communicated with the plaintiff and offered to return the car and treat the deal as cancelled. The plaintiff would not agree to that. The defendant stopped the cheque and the plaintiff sued on the cheque.

---

[4] [1948] 1 K.B. 695; 64 T.L.R. 111; [1948] 1 All E.R. 283.

[5] (1838) 4 M. & W. 270.

[6] [1950] 1 K.B. 601; 66 T.L.R. (Pt. 1) 429; [1950] 1 All E.R. 261.

There were two defences which the judge considered first, and in respect of them there is no appeal. The defendant sought to say that there was a warranty which was broken by the state of the chassis. The defendant also sought to say that there was an express agreement that the cheque should be in the nature of an escrow pending further inspection by the defendant. The judge negatived both those defences. We are concerned, therefore, only with the third defence, that this contract was illegal. If that were established it is conceded that the nature of the illegality was such that the plaintiff could not recover on the cheque.

The matter arises under section 8 (1) of the Road Traffic Act, 1934. [His Lordship read the section and subsection (4) and continued:] The judge, having considered that there was a breach, held that the plaintiff could not rely on the proviso in subsection (4). I agree with his decision as to the proviso and need not refer to it again.

Section 8 (1) sends one back to section 3 of the Road Traffic Act, 1930, which provides: "Subject as hereinafter provided, "it shall not be lawful, to use on any road a motor-vehicle ". . . which does not comply with the regulations applicable to "the class or description of vehicles to which the vehicle belongs, "as to the construction, weight and equipment thereof." The other relevant section is section 30, which is concerned generally with regulations: "The Minister may make regulations for any "purpose for which regulations may be made under this Part of "this Act, and for prescribing anything which may be prescribed "under this Part of this Act, and generally as to the use of motor-"vehicles and trailers on roads, their construction and equip-"ment and the conditions under which they may be so used and "otherwise for the purpose of carrying this Part of this Act into "effect. . . ." It will be seen that the power there given goes beyond the subject-matter of section 3, which is concerned with construction, weight and equipment.

The real question is whether the defects come under section 3, or whether they are outside that section, and are breaches of regulations made under the wider power given by section 30. There were three defects. The speedometer cable was broken. The plaintiff told the defendant about that, and he also told him that he had got another cable. It would have been a comparatively simple matter, I imagine, to fit it, but he had not had time to fit it. Then the foot brake was defective: it was said that one had to bump the foot lever. That was a defect which, on the judge's finding—and this was common ground—could be remedied. Indeed, a sum was allowed off the original price in respect of those two matters. It was also found, though the plaintiff did not realize this, that the silencer was not in proper working order. The judge dealt with those matters and set them out as breaches of regulations which undoubtedly purport to deal with the subject-matter of section 3, namely, construction and equipment. If that were right, and if they were defects which fell properly within section 3, the conclusion would be that the sale was illegal, as the judge held.

It was argued before us that these defects were not within the subject-matter of section 3. Put very broadly, it was said that the car was properly constructed, the equipment was there, that all that had happened was that it was not in good working order, which was a matter outside section 3. The fact that it is also inside the wider regulation does not, of course, affect the argument, but that is the background against which we have to deal with the matter.

Part II of the Motor-Vehicles (Construction and Use) Regulations, 1951, is called "Regulations governing the construction, "weight and equipment of motor-vehicles and trailers," a heading which reproduces the wording of section 3. Part III is headed: "Regulations governing the use of motor-vehicles and trailers," a heading which indicates an intention obviously to use the wider power conferred by section 30. Although there may be difficult borderline cases, it is quite plain that the construction of a machine is one subject-matter and the maintenance of that construction in good working order is another subject-matter.

Having read the judgment and the findings of the judge, and having listened to counsel, in my view all these defects indicated a failure to keep and maintain in good working order. There was the silencer, the speed indicator, and there were the brakes. There is no suggestion in the judgment, or in any argument put before us, that so far as construction was concerned they had not

C. A.
1954

VINALL
v.
HOWARD.

Somervell L.J.

been constructed all right. It was sought to say that there was a breach of the "construction" regulations because the things did not work. With regard to the speedometer, taking that as an example, regulation 12 provides: "To every motor-vehicle "registered on or after 1st October, 1937, and to every public "service vehicle which is for the time being used as an express "carriage there shall be fitted an instrument so constructed and "in such a position as at all times readily to indicate to the driver "of the vehicle within a margin of accuracy of plus or minus 10 "per cent. if and when he is driving at a speed in excess of that "specified in paragraph (2) of this regulation." In my opinion that provides for the fitting of the instruments. That is reinforced in considering this code as a whole by regulation 73, which provides: "Every instrument for indicating speed provided in "compliance with the requirements of regulation 12 of these "regulations shall (*a*) at all material times be maintained in "good working order."

It is plain that the offence here was under regulation 73 and not under regulation 12. Mr. Gazdar, for the defendant, put to us various other regulations and posed problems which it is unnecessary to decide. He took the example of a mirror. He said that if the mirror was not there, there being no special maintenance provision with regard to mirrors, we must hold that there was a breach of the "construction" regulations. It seems to me, however, quite sufficient that we should decide this case on the basis that these defects are outside section 3.

I would, however, add that Mr. Aldous, for the plaintiff, in opening the appeal used words, which he does not seek to uphold now, which indicated that he was putting forward the view that section 3 applied only to the original manufacture. I think that that must be wrong. If there has been anything in the nature of a reconstruction, or it may be anything which could be properly described as an alteration in construction, so far as I can see section 3 would apply. I only say that much to indicate that in coming to my decision I have not based myself on any rigid principle that section 3 applies only at the time of the original construction. I do not think that it does; I think that it has a wider application. That conclusion is, I think, borne out by *Keeble* v. *Miller*,[1] although that case was concerned with a different section.

---

[1] [1950] 1 K.B. 601; 66 T.L.R. (Pt. 1) 429; [1950] 1 All E.R. 261.

For these reasons, holding that these defects are outside section 3, it follows that the contract was not made illegal by section 8 (1) and that the plaintiff is entitled to succeed.

BIRKETT L.J. I am entirely of the same opinion. I am glad that we are able to come to this conclusion because from the very outset of this appeal I felt that in some respects the judgment of Streatfeild J., on the facts, was a somewhat startling proposition. Possibly the explanation is that the attention of the judge was directed to other matters in the case which rather drew his attention away from the point which has been argued before us.

The important point with which we are concerned was put in this way: it was said that this was an unlawful sale by reason of section 8 (1) of the Act of 1934. That subsection prohibits the sale of a motor-car which offends against section 3 (1) of the Road Traffic Act, 1930. Section 3 (1) deals with the construction, weight and equipment. Part II of the regulations of 1951 refers to the construction, weight and equipment of motor-vehicles and trailers, whereas Part III deals with the regulations governing use and maintenance. In his judgment, when dealing with the matters which were alleged, one, the speedometer, two, the silencer, and three, the braking system, the judge said [2]: "The "particulars pleaded, under which it is said that this motor-car "was illegally sold because it was unroadworthy, refer first to "the speed indicator, and it is admitted by the plaintiff that in "fact the speedometer was in breach of regulation 12 of the "regulations of 1951." Similarly, with regard to the silencer, he said [3]: ". . . it is admitted . . . that that is in fact a breach "of regulation 20." Thirdly, with regard to the braking system, he said [4]: ". . . it is admitted that [it was not equipped with "an efficient braking system] and that it was in breach of "regulation 44."

Of course, if there had been breaches of those three particular regulations then one can understand why the provisions of section 8 (2) of the Act of 1934, and section 3 (1) of the Act of 1930, were invoked. It does seem a somewhat startling thing to say that if one sells a motor-car in which the speedometer happens to be faulty or the silencer is not quite efficient, or the braking system is not quite up to the mark, one has made an illegal sale. But I think that all those three matters which were the subject of contest in the court below were not breaches of the

[2] [1953] 1 W.L.R. 987, 990; [1953] 2 All E.R. 515.

[3] Ibid.

[4] Ibid.

regulations which are named by the judge, but were, if anything, breaches of the regulations under Part III, dealing with use and maintenance. I think that those matters which were debated before the judge in the court below were quite outside the province of Part II and the regulations made thereunder, but were proper to be considered under Part III. For these reasons I agree that his judgment ought to be reversed.

UPJOHN J. I agree.

Appeal allowed.
Judgment entered for plaintiff for £310,
with interest.

Solicitors: *Curwen, Carter & Evans; Vanderpump & Sykes.*

A. W. G.

HARTLEY *v.* MAYOH & CO. AND ANOTHER.

[1951 H. No. 2884.]

C. A.
1954
Jan. 14, 15.

Singleton, Jenkins and Hodson L.JJ.

Invitor and Invitee—Factory—Fire—Dangerous premises—Causation—Injury caused by concurrent causes—Failure to turn off main switch—Other switch turned off—Wires transposed unknown to occupier—Fireman electrocuted—Whether occupier liable—Relevance of statutory duty regarding switches.

Factory—Persons benefited by regulations—"Person employed"—Fireman electrocuted in factory premises while fighting fire—Mains switch not conforming to regulations—Firemen not "persons "employed"—No right of action—Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act,* 1948 (11 & 12 *Geo.* 6, *c.* 55), *s.* 12)*—Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts,* 1901 *and* 1907 (*S.R. & O.* 1908, *No.* 1312).

Factory—Electricity—Switch. Factory—Common law duty—Relevance of regulations. Fire Brigade. Causation. Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 *and* 1907 (*S.R. & O.* 1908, *No.* 1312).

The Factories Act, 1937, s. 60, as amended by the Factories Act, 1948, s. 12, gives the Secretary of State power to make regulations where he is satisfied that the nature of the work or plant in factories is "of such a nature as to cause risk of bodily injury "to persons employed. . . ."

C. A.
1954

Hartley
v.
Mayoh & Co.

Fire brigade officers summoned to a fire in factory premises asked the factory manager to direct them to the main electric switch in order to cut off all current to the premises. This, unknown to the manager, consisted of two small tumbler switches, which both he and the firemen ignored; but he directed them to other master switches which were switched off, and which would have effectively cut off all current to that part of the premises where the fire was, had not two wires been transposed at a point in the wiring system, that transposition being the responsibility of the area electricity authority. Accordingly the current remained in the wires throughout the circuit so long as the main switch was on. A fire officer was electrocuted in the fire.

In an action by his widow, Barry J. held the electricity authority liable as to 90 per cent. of the damages. He held the occupiers of the factory liable for the remaining 10 per cent. (1) as invitors at common law, and (2) for breach of regulation 9 (relating to main switches) of the electricity regulations of 1908. On appeal by the occupiers:—

Held, first (affirming Barry J.) that as regulation 9 of the regulations of 1908 imposed on the occupier of a factory the duty to know his own main switch, the manager ought to have known that the two tumbler switches constituted the main switch and that there was danger to firemen if all current was not cut off; that that was an unusual danger on the premises against which the occupiers as invitors ought to have protected or warned the firemen, as invitees; that though the manager neither knew nor ought to have known that the wires were transposed, his original negligence in relation to the main switch persisted to cause the fireman's death; and that the occupiers were accordingly liable at common law.

Held, secondly (reversing Barry J.) that, though the placing of the tumbler switches constituted a breach of the regulations, the deceased did not belong to the class of "persons employed" for whose benefit the regulations were enacted, and, therefore, the plaintiff could not maintain a civil action successfully against the occupiers for breach of statutory duty.

Decision of Barry J. [1953] 2 All E.R. 525 on apportionment of liability affirmed.

Appeal from Barry J.

On Sunday morning, September 24, 1950, the Salford Fire Brigade was summoned to a fire which had broken out in the upper portion of the small factory premises of Mayoh & Co., pickle manufacturers, the first defendants. On arrival at the scene, Divisional Officer Reginald Dingle Hartley and sub-officer Bigland, following the invariable rule for members of fire brigades, went to locate the main electric switches in order to cut off the electric supply to the premises, and so avoid the risk of firemen in wet clothes being electrocuted. Bigland was directed to the main switchboard by the factory manager, Holland. The fire officer switched off two ironclad and obvious master switches on the left of the board, but paid no attention to, and was not directed to, two small tumbler switches on the right of the board which were unconnected by any form of link-bar, but which were in fact the main switches for the whole premises. The fire officers next ensured that a master switch, which controlled the whole lighting circuit to that part of the factory where the fire was, was at the " off " position, and dealt similarly with two individual switches for that part of the building, so that in the normal course, there should have been no electric current in that part of the premises, even though the main switch had not been turned off.

Several of the firemen having received minor shocks, Bigland asked the manager whether there were any other switches, and the manager assured him that there were not, but went back to the switchboard with him to ascertain that the ironclad switches, which he believed to be the main switches, were off. Meanwhile, Divisional Officer Hartley had entered a blazing room, and shortly afterwards was found, lying in the fire with an electric wire in his hand; he died almost at once.

His widow brought an action under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the first defendants as occupiers, and the second defendants, the North-Western Electricity Board, as the electricity authority, claiming damages for negligence at common law and for breaches of statutory duty under the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907 (S.R. & O. 1908, No. 1312, as amended by S.R. & O. 1944, No. 739), and the Electricity Supply Regulations, 1937, regulation 25 (*a*).

Barry J. found that the death was due to two causes, in the absence of either one of which the deceased would not have met his death: (1) that the electricity supply had not been cut off because no one had realized that the two tumbler switches controlled the circuit; he found, however, that the wires in the upper part of the building should have been " dead " as they should have been disconnected by the other switches which were all at the " off " position, but for the second cause of the accident, which was (2) that certain connexions between the two tumbler switches and the electricity meter and the neutral phase wire on the switchboard—connexions for which the electricity authority was wholly responsible—had at some time unknown been transposed, with the result that the neutral wire remained "live" throughout the circuit. The judge found that the accident could not have happened if the tumbler switches had been in the "off" position, nor could it have happened if the current had not been flowing through the neutral wire.

Barry J. held that the occupiers of premises of this kind ought to have been aware of the way in which the main supply to the lighting and power circuits could be switched off, and that they were in breach of their duty at common law to warn the fire officer, an invitee, of that which constituted an unusual danger on their premises; alternatively, they should have rendered their premises free of that unusual danger by fitting a link-bar between the tumbler switches or fixing a notice nearby indicating that they were the main switches. The judge also held that the occupiers were in breach of the statutory regulations, in particular regulation 9, holding that once an act or omission caused danger to "persons employed" on the premises, the right to protection given by the Factories Act, 1937, s. 60,[1] as amended by the Factories Act, 1948, s. 12,[1] extended to other persons lawfully on the premises.

He held that the second defendants were also liable both at common law and under the Electricity Supply Regulations, 1937, regulation 25 (*a*), and gave judgment for the plaintiff for £10,049, apportioning the damages as to 10 per cent. against the first defendants and as to 90 per cent. against the second defendants. The occupiers appealed against that apportionment.

Neville Laski Q.C. and *J. W. Da Cunha* for the occupiers. In view of Barry J.'s finding that the switching off by the occupiers of the two sets of intervening switches to that part of the building where the fire was would have been completely effective to prevent the accident, had it not been for the transposition of the wires, he ought not to have held the occupiers in any way liable for the accident. Had it not been for the negligence of the electricity board in relation to the transposed wires, the absence of a link-bar connecting the two tumbler switches, which was admittedly a breach of regulation 9, would not have mattered at all. Applying to the present facts the statement of Lord Wright on causation in *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* [1] that "the choice of the real or efficient cause "from out of the whole complex of the facts must be made by "applying commonsense standards," and that "causation is to "be understood as the man in the street and not as either the "scientist or the metaphysician would understand it," it is submitted that the real cause here was the transposition of the wires. [*Davies* v. *Swan Motor Co. (Swansea) Ld.*[2] was also referred to.]

---

[1] Factories Act, 1937, s. 60: "(1) "Where the Secretary of State is "satisfied that any manufacture, "machinery, plant, process, or de- "scription of manual labour, used in "factories is of such a nature as to "cause risk of bodily injury to per- "sons employed in connexion there- "with, or any class of those persons, "he may, subject to the provisions of "this Act, make such special regu- "lations as appear to him to be "reasonably practicable and to meet "the necessity of the case."

Factories Act, 1948, s. 12: "(1) "In subsection (1) of section 60 "of the principal Act after the word "'plant' there shall be inserted the "words 'equipment, appliance' and "for the words 'persons employed in "'connexion therewith' there shall "be substituted the words 'the per- "'sons employed'; . . ."

Before Barry J. it was submitted that the regulations were for the protection of the occupiers' employees only and that the fireman, as invitee, was not within their scope, so that the plaintiff had no cause of action founded on the breach of statutory duty.

[Counsel was not required to argue on that point.]

H. I. Nelson Q.C. and *C. M. W. Elliott* for the North-Western Electricity Board. The occupiers cannot escape liability, for they had on their factory premises a dangerous electrical installation in breach of regulation 9, which was an unusual danger vis-á-vis the fireman and was *a* cause of his death. That, on the authority of *Stimpson* v. *Standard Telephones and Cables Ld.*,[3] is sufficient to give the plaintiff a cause of action at common law without more. These occupiers cannot be heard to say that they did not know that their main switch should have had a link-bar, for they are under an absolute duty to comply with the regulations. Assuming that the plaintiff had been barred by time from bringing an action against the electricity board, a public authority, and that her only remedy lay against the occupiers, they would on these facts have had no defence, for despite the fact that the main cause was the transposed wires, the accident could not have happened if the main switch had been recognized as such and had been turned off.

---

[1] [1942] A.C. 691, 706; 58 T.L.R. 263; [1942] 2 All E.R. 6.

[2] [1949] 2 K.B. 291; 65 T.L.R. 278; [1949] 1 All E.R. 620.

[3] [1940] 1 K.B. 342; 56 T.L.R. 90; [1939] 4 All E.R. 225.

Barry J. was right in holding the occupiers liable on the claim based on breach of statutory regulations, for the deceased fireman was a "person employed" within the meaning of section 60 of the Factories Act, 1937, as amended by section 12 of the Factories Act, 1948; he was a person for whose benefit the regulations were made. The condition precedent to exercising the regulation-making power is that the Secretary of State shall be satisfied that a particular process in a factory is of such a nature as to cause bodily risk to "persons employed" in the factory. Once that condition is satisfied, the class of persons to be protected is not limited to those employed by the occupier, but extends to anyone lawfully having business on the premises.

[JENKINS L.J. Would a commercial traveller calling on the manager be within the class?]

Yes; for the Secretary of State looks beyond the "persons employed" to the user of the factory.

[SINGLETON L.J. The factory legislation is for the protection of persons employed in the work of the factory. Every judgment in *Groves* v. *Wimborne* (*Lord*)[4] stressed that view.]

The present point did not arise in that case, and there is no authority on it. It is conceded that these regulations were passed for the benefit of a class and not for the public as a whole. That distinguishes the present case from *Monk* v. *Warbey*,[5] where the court held that the breach of a regulation passed for the benefit of the public as a whole did not give a right of action to any one person. It is for the court to decide who is to be included in the class. Barry J. said that the regulations should be given a liberal construction. It is conceded that where a breach of statutory regulations is a criminal offence and there is an ambiguity in them, they must be construed in favour of the person charged. But here the empowering section of the Act is not limited in any way to protecting only persons employed by the occupier.

[JENKINS L.J. Section 152 (4) and (6) of the Act of 1937 is rather against that construction, for if it is right, that section, which specifically brings certain persons within the class of persons who have a right of action, would not have been necessary.]

If the court defines the class as limited to "persons employed "by the occupier," Barry J. ought to have decided the claim based on the breach of statutory duty the other way, for the fireman was not so employed.

---

[4] [1898] 2 Q.B. 402; 14 T.L.R. 493.

[5] [1935] 1 K.B. 75; 51 T.L.R. 77.

Neville Laski Q.C. in reply. The regulations impose an absolute standard of duty. That absolute standard should not be imported from the regulations and imposed on the occupiers when considering their common law duty, which is to take such reasonable care as the reasonable man with the ordinary amount of knowledge would take to avoid injury. That was the standard of duty laid down by Lord Thankerton in *Glasgow Corporation* v. *Muir.*[6] The occupiers here have satisfied that standard.

D. J. Brabin Q.C. and *Philip Curtis* for the plaintiff.

SINGLETON L.J. stated the facts, and continued: The second defendants, the North-Western Electricity Board, have not appealed against the judgment which was given against them, and that is not surprising, for it is found by the judge that they were responsible for the transposition of the wires. The judge said: "I am, however, forced to the conclusion that, on a strong balance "of probability, the original crossing of the two leads from the "tumbler switches to the board's apparatus was the fault of "someone, some unknown employee of the board. This fault "was committed on some previous occasion which it is wholly "impossible to identify"; and he gave other reasons for the conclusion which he reached.

When any work of importance was done to the electricity system in this factory a representative of the board, or of their predecessors, carried out a test; and if there had been a proper test, this defect, which must have been of long standing, must have been found. The tumbler switches indeed constituted what ought to have been regarded as the main switch. A main switch ought to have an iron bar across it, so that it would be recognized as a main switch; but when one has merely two tumbler switches with the appearance these two had it is unlikely that they would be recognized by anyone, and certainly not by a fire brigade officer coming to the factory, as a main switch. From what I have said it is clear that an appeal on the part of the Electricity Board could have had no hope of success. The main responsibility, if not the whole of the responsibility, for this accident lies on the board or on its predecessors. There had been work done which should have been followed by a test some time in the late 1930's, I think, again in 1946, and again in 1950. Witnesses from the board said that the system of having a main switch of this kind was obsolete, and that their practice was to point that out to occupiers. They had not pointed out anything of that nature to the occupiers of this factory, which is a matter for great regret.

---

[6] [1943] A.C. 448, 454; 59 T.L.R. 266; [1943] 2 All E.R. 44.

Mr. Laski, on behalf of the first defendants, submitted to this court that the whole of the responsibility arising from the death of Hartley rested on the board, and that no negligence was proved against his clients, the occupiers of the premises, nor was there any breach of statutory duty by them. In any event, he said, if there was a breach of statutory duty, the officer who was killed was not a person for whose benefit the regulations were made, and an action for breach of statutory duty would not lie on the part of his widow.

The Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907, are preserved for present purposes by section 159 of the Factories Act, 1937. The power to make regulations now is given by section 60 of the Act of 1937: " (1) Where the Secretary of State is satisfied that any " manufacture, machinery, plant, process, or description of " manual labour, used in factories is of such a nature as to cause " risk of bodily injury to persons employed in connexion there- " with, or any class of those persons, he may, subject to the " provisions of this Act, make such special regulations as appear " to him to be reasonably practicable and to meet the necessity " of the case."

It is to be observed that the power to make the regulations is given when the Minister is satisfied that the work is of such a nature as to cause risk of bodily injury to " persons employed." Those words embrace the amendment made by section 12 of the Factories Act, 1948, prior to which time the power to make the regulations was given if the Minister was satisfied that the manufacture, etc., was of such a nature as to cause risk of bodily injury to persons employed " in connexion therewith."

I do not think that Hartley, who met with his death on this occasion, was a person for whose benefit the regulations could be made, or were made.

A somewhat similar position arose in 1898 in *Groves* v. *Wimborne (Lord)*,[1] and in each of the judgments in that case the question was discussed whether the Factories Act, or a particular section of it, was passed in the interests of the public at large or of a particular class of persons. That appears from the judgment of A. L. Smith L.J.[2] and that of Rigby L.J.[3] and from that of Vaughan Williams L.J.[4] In my view Hartley was not one of the class of persons for whose benefit the regulations were made in that he was not a person employed. For that reason I do not think that an action for breach of statutory duty lies against the occupiers.

---

[1] [1898] 2 Q.B. 402; 14 T.L.R. 493.

The regulation on which reliance was placed is regulation 9 of the regulations of 1908, which provides: "Where one of the "conductors of a system is connected to earth, no single-pole "switch, other than a link for testing purposes or a switch "for use in controlling a generator, shall be placed in such "conductor or any branch thereof."

It is agreed for the purpose of this appeal that the tumbler switches, as they were placed and as they were at that time, constituted a breach on the part of the occupiers of regulation 9. Though that breach does not, in my view, give the right to an action for damages for breach of statutory duty, I feel that regard must be had to it from another point of view. The occupier of a factory is in a different position from the occupier of a private house or flat. He is charged with certain duties under the Factories Acts, and under the regulations which are made under those Acts in so far as they affect factories. Regulation 9 put a duty in regard to a single-pole switch on the occupier of a factory. Thus it is clear that the occupier of a factory must know something about his switches; it seems to me that he ought to know where the main switch is. That is a matter for consideration when one has to deal with the claim made for damages for negligence at common law. It was said on behalf of the plaintiff against the first defendants: "You, Mayohs, are occupiers of a factory, the "premises on which the man Hartley went, and thus the ordinary "law with regard to invitor and invitee applies, and Hartley being "an invitee, using reasonable care on his part for his own safety, "was entitled to expect that you, the occupiers, would on your "part use reasonable care to prevent damage from unusual danger "of which you knew, or ought to have known"; and it was added that no warning was given of any unusual danger.

The unusual danger of which the occupiers knew, or ought to have known, was that their main switch, which consisted of two tumbler switches, was not indicated in the normal way. Holland, their manager, did not know that that was the main switch. The judge pointed out that if he knew that those switches did not serve any lighting points in the building, he was at least put on inquiry to find out what they were. He had been there almost 20 years at the time of this fire; he did not know where the main switch in the building was; and when on the day of the fire the fire brigade officers came on duty to the factory the manager, though he showed them the switches of which he knew, did not show them this main switch. For my part, I do not think that he can be heard to say that he was not negligent in that respect, for his duty as manager of the factory was to know where the main switch was.

---

[2] [1898] 2 Q.B. 407.
[3] Ibid. 413, 414.
[4] Ibid. 415, 416.

Mr. Laski submitted that that did not matter; the real cause of this accident was the transposing of the two wires in connexion with the tumbler switches. That, said he, was what brought current into the neighbourhood of the fire and caused the death of Hartley; to which it was replied: yes, but if the main switch had been indicated as a main switch, or if the fireman had been told it was the main switch, this accident would never have happened.

Barry J. said that he accepted the evidence of the many witnesses who told him that any fireman would assume that two unconnected tumbler switches controlled some lighting points, but not the main supply. There was no negligence, in other words, on the part of any officer of the fire brigade.

In dealing with the duty owed by an invitor to an invitee the judge said: " Stated at its very lowest, the duty of an occupier " of premises to his invitee is to use proper care to ensure that " his premises are free from any unusual danger, or, alternatively, to give due warning of any unusual danger of which " he knows, or ought to know. With this standard in mind " I am quite satisfied that the first defendants failed to fulfil " their common law duties towards the deceased. It is, however, right to say this—I acquit them of any conscious default. " I am also far from satisfied that they ought to have known " that the polarity of the lighting system had been reversed by " the crossing of the leads between the tumbler switches and the " meter and neutral phase. On the other hand, I consider that " the occupiers of premises of this kind ought to have been " aware of the way in which the mains supply to the lighting " and power circuits could be switched off. I am fortified in this " view by the manager's evidence. He told me that he knew " that the two tumbler switches did not control any local lighting points. This should, I think, have put him on inquiry "as to their true function. Neither he nor anyone else in the "employment of the first defendants warned the deceased of "the unusual danger which existed in these premises for firemen "or other persons who might come into contact with the electric "wires, this unusual danger being, of course, the fact that the "lighting supply was controlled by a switch which was "not apparently a mains switch and that electric current could "circulate through the electric circuit when the only two "switches which appeared to be mains switches were turned to "the 'off' position. Put in another way, the first defendants "ought, I think, to have realized that the absence of any link-"bar between the two tumbler switches constituted an unusual "danger to persons in the situation of the deceased, against "which such persons clearly ought to have been warned. If "no warning was to be given, the first defendants should have "fulfilled their alternative duty; that is to say, they should "have rendered their premises safe and eliminated this unusual "danger by the very simple means of fitting a link-bar between "the two tumbler switches or fixing some label or notice in the "neighbourhood of the switches indicating that they controlled "the main lighting supply to the building." That is the way in which the judge put the case on the plaintiff's claim against the first defendants for negligence.

I was very impressed by the argument of Mr. Laski on this part of the case. It is extraordinarily hard on the occupiers, who may well have thought that they were entitled to rely on the visits from time to time of officers of the board, that they should be found guilty of negligence by reason of the fact that they had not pointed out the unusual danger which would have been avoided if the regulations had been carried out. The real danger was introduced by the transposing of the wires. I feel for myself that Barry J. might have reached a conclusion that, as the main responsibility was on the board, he might well have said that the whole fault was on them, as Mr. Laski submits.

[His Lordship considered the evidence and continued:]

I approach the matter in this way: suppose that time had run in favour of the second defendants as a public authority before an action was brought, and the only defendants had been Mayoh & Co., and it had been proved that their manager did not know where the main switch was, but indicated to the fire brigade other switches as being the main switches: is it clear that an action against the occupiers in those circumstances would have failed? I do not think that it is. It would have been for the judge to make up his mind on the evidence whether negligence was proved or not. The judge arrived at the conclusion that he could not exonerate Mayoh & Co. entirely.

Mr. Laski reminded this court that this is a re-hearing, and that if we reach the conclusion that the judge was wrong we ought so to say. I am not satisfied that he was wrong in deciding that the occupiers of the premises were responsible to some extent. I have already said that I do not agree with the judge's finding that an action for damages for breach of statutory duty would lie in this case, but on the other part of the claim I feel that the appeal of Mayoh & Co. must be dismissed.

JENKINS L.J. I have found considerable difficulty in this case, but on the whole I have come to the conclusion that the judge's decision to the effect that the defendants, Mayoh & Co., are liable at common law to the plaintiff in respect of the accident to her husband ought not to be disturbed. I think that the defendant firm, in the person of their manager on the spot, ought to have known that the two tumbler switches in fact constituted the main switch for the lighting circuit in this building. The manager ought to have known that fact in his capacity as the manager of this factory, particularly in view of the statutory obligation to their own workpeople owed under the electricity regulations. Further, the manager, as representing the defendant firm, ought to have known that this was not a normal or modern type of main switch, and that the men of the fire brigade would be likely to overlook the fact that it was a main switch, and to consider that by turning off the two power circuit main switches adjacent to the switchboard they had turned off the whole of the electric supply to this factory. Further, I think that the manager must be taken to have known that it would be highly dangerous for the firemen to proceed to deal with the fire unless all current was cut off from the building so as to prevent the risk to them of injury by electric shocks. In these circumstances, it seems to me that the manager ought to have known that the firemen here were exposed to an unusual danger consisting of the risk that, owing to the unusual and obsolete character of the main switch relating to the lighting circuit, they might seek to deal with the fire on the mistaken assumption that by turning off the two power circuit main switches they had effectively made the whole of the electrical system in the factory dead. That being so, under the ordinary law of invitor and invitee it was the duty of the defendant firm through their manager to protect the firemen from damage arising from this unusual danger, or to warn them of it. In actual fact he did neither of these things, and the result was that the current in the lighting circuit was not cut off at the main switch. So far, it seems to me, it would be reasonably plain that the judge was justified in holding the defendant firm liable. It is, however, still necessary to consider the effect on that conclusion of the circumstance that the master switch controlling all the lights in the upper part of the building (which was the seat of the fire) was turned off, so that if all the wiring in connexion with this system had been in proper order no current would have reached the upper storey by reason of the omission to turn off the two tumbler switches which constituted the main switch for the lighting circuit.

Mr. Laski has forcefully argued that inasmuch as this master switch would have effectively rendered dead the electric wires in the immediate vicinity of the fire if the wiring had been in order, it cannot be said that the manager's omission to see that the firemen understood which were the main switches caused, or contributed to, the death of Hartley to any extent. The true cause, he said, was the reversing of the phase wire and the neutral wire at the switchboard, which prevented the master switch from effectively cutting off the current.

It will be remembered that the judge in effect found it impossible to hold that the defendant firm or the manager knew, or ought to have known, of this reversing of the wires, and, accordingly, on Mr. Laski's argument, the true cause of the fatal accident to Hartley was an unusual danger of which it could not be said that the manager or the defendant firm knew, or ought to have known. I certainly would not differ from that finding. Nevertheless, in my view, the defendant firm cannot escape liability on account of the fact that the master switch was not shut off.

I think that feature of the case should be looked at in this way: for the reasons which I have endeavoured to state, there was negligence on the part of the defendant firm in the person of the manager, and that negligence had resulted in an omission to shut off the main switch of the lighting circuit. If the wires had not been crossed at the switchboard the circumstance that the master switch was shut off would have averted the consequences of that negligence, but inasmuch as the wires were crossed, or reversed, although that was not a circumstance of which the manager either knew, or ought to have known, nevertheless the result was that the consequences of the original negligence did operate; and accordingly, although, as I have said, I regard this as a difficult case and I think that it is very near the line, I am on the whole of opinion that the judge's conclusion on this aspect of it ought not to be disturbed.

I agree that the existence of the statutory obligation under regulation 9 of the Electricity Regulations of 1908, which provides: " Where one of the conductors of a system is connected to earth, " no single-pole switch, other than a link for testing purposes or " a switch for use in controlling a generator, shall be placed in " such conductor or any branch thereof," affords strong support for the view that one must conclude that the manager, and through him the defendant firm, ought to have known of the probability that the two tumbler switches would not be recognized as a main switch, inasmuch as it was the duty of the defendant firm to link those two switches by means of a bar or other device in order to satisfy the provisions of regulation 9. On the other hand, I agree with my Lord that Hartley was not a person belonging to the class of " persons employed " for whose benefit these regulations were enacted, and, accordingly, I agree that the plaintiff could not successfully maintain a civil claim based on breach of that statutory duty.

I have only to add that, in my view, the case would be clearer against the defendant firm if it was plain on the evidence that the report of Bigland or other members of the fire brigade that they were still receiving electric shocks after the main switches had supposedly been turned off had been made, and that the manager's assurance that all the main switches were turned off had been given, before the moment when Hartley met his death; but the evidence as to the order of events is not sufficiently definite to make it possible for me to form my conclusion on that. Even so, for the other reasons which I have endeavoured to state, I think that the judge's judgment on the matter of common law liability should stand. Accordingly I agree that this appeal fails and should be dismissed.

HODSON L.J. I agree with both the judgments which have been delivered, and have very little to add. It is abundantly clear that the substantial cause of this accident was the negligence of the second defendants, who have been found 90 per cent.

to blame. Mr. Laski has put his argument on behalf of the first defendants forcefully and shortly, basing himself on the language of Lord Wright in *Yorkshire Dale Steamship Company Ld.* v. *Minister of War Transport* [5]: "This choice of the real or efficient "cause from out of the whole complex of the facts must be made "by applying commonsense standards. Causation is to be under-"stood as the man in the street, and not as either the scientist "or the metaphysician, would understand it."

Mr. Laski said, looking at this matter from the commonsense point of view without endeavouring to be unduly scientific or metaphysical, that the cause of this accident was the fact that the wires from the main switch to the meter were transposed, so that the main switch not being in the "off" position, the electricity was running wild in the building along the neutral wires which should have been dead.

That is a very strong argument, but the judge has found that there was a subsidiary and less important cause of this accident, which was that the first defendants, the occupiers of the factory where the fire occurred and where the man met his death, were in breach of their common law duty, because if the main switch, which they ought to have known was a main switch, had been in the "off" position the accident would not have happened. That is sufficient to establish a causal connexion between the negligence and the accident. It is true that the manager had switched off another switch between the main switch and the premises where the man met his death, and two subsidiary switches, three in all, which would, if the wiring system had been in order, have prevented the accident. As Jenkins L.J. has pointed out, the wiring system not being in order, in my view it is open to the court to come to the conclusion that the consequences of the original negligence persisted, and it is not right to exclude from consideration the deficient knowledge of the first defendants of the inefficiency of their switch, and its situation.

I think that the way in which Lord Wright put it, that this is a matter for the man in the street and is not a matter of scientific investigation, leads one to the conclusion that on the question of causation this court should be slow to interfere with the conclusion of the trial judge. Mr. Laski said quite rightly that although the court should be slow to act, nevertheless it is open to the court to do so. I accept that, but difficult as this case is, I feel myself unable to say with any certainty—indeed, I feel the reverse—that one can exclude from consideration in dealing with the position at common law the fact that the first defendants were in breach of the electricity regulations.

---

[5] [1942] A.C. 691, 706; 58 T.L.R. 263; [1942] 2 All E.R. 6.

On the regulation itself, on which the plaintiff relied, I agree that it is not open to the plaintiff to found her cause of action upon that. Regulation 9 is in general terms and does not exclude the plaintiff from the class of persons who may bring an action; it leaves that wide; but the regulation is made under what is now section 60 of the Factories Act, 1937, which gives power to the Minister, on being satisfied that any manufacture, or machinery, or other matter, in a factory is of such a nature as to cause the risk of bodily injury to the persons employed, to make such regulations as appear to him to be reasonable and practicable, and to meet the necessity of the case. That involves this, that regulations can only be made within the limits of the powers conferred by section 60, and section 60 contains the words "persons "employed," which were substituted for the words "persons "employed in connexion therewith" in the earlier legislation. These words do not, in my opinion, extend the ambit of the Act far enough to include a fireman who comes on the premises to fight a fire, whether called by the occupier or anyone else.

I respectfully disagree with the judge's construction of the words "persons employed" as being wide enough to cover such a person, and, as I have already made clear, I do not regard the regulations as being open to separate construction apart from the section of the Act under which they are made. I agree, therefore, that the appeal fails.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown, for Shaw, Smith & Co., Manchester; L. Bingham & Co., for James Chapman & Co., Manchester; Bower, Cotton & Bower, for George Davies, Manchester.*

M. M. H.

NIGHTINGALE *v.* COURTNEY.

C. A.

[Plaint No. J. 4259.]

1954
Jan. 18, 19.

Evershed M.R., Denning and Romer L.JJ.

Landlord and Tenant—Rent restriction—Statutory tenant—Contract to purchase dwelling-house by statutory tenant—Status of purchaser pending completion—Whether statutory tenancy surrendered—Express preservation of existing tenancy—Intention of parties.

Vendor and Purchaser. Landlord and Tenant—Contract by tenant to purchase reversion.

The statutory tenant of part of a dwelling-house within the Rent Acts contracted to purchase the leasehold reversion of the whole house. The terms of the contract provided that the sale of the lower flat was "subject to the existing tenancy of the purchaser," and that vacant possession of the top flat was to be given on completion. The vendor reserved the right to arrears of rent from a date prior to the signing of the contract. The purchaser continued in possession but paid neither interest on the purchase money nor rent. He failed to complete the purchase. The vendor rescinded the contract and brought an action for possession on the grounds, first, of non-payment of rent, and, secondly, that the tenancy had been surrendered as a result of the signing of the contract to purchase the reversion. The county court judge made an order for possession on the second ground, holding that after the surrender the defendant had remained in possession as a mere licensee and that his licence had been validly determined. The tenant appealed:—

Held, (1) that by the terms of the contract of purchase the parties had negatived any intention that the tenancy should be surrendered on the signing of the contract and, consequently, in accordance with the general rule such a contract would not operate as a surrender of a contractual tenancy.

Doe d. *Gray* v. *Stanion* (1836) 1 M. & W. 695 and dicta of Somervell L.J. in *Leek and Moorlands Building Society* v. *Clark* [1952] 2 Q.B. 788, 791; [1952] 2 T.L.R. 401; [1952] 2 All E.R. 492 applied.

Turner v. *Watts* (1927) 44 T.L.R. 105 (44 T.L.R. 337, C.A.) distinguished.

Held, secondly, that the effect of the contract was not different by reason of the fact that the occupation prior to the signing of the contract had been by virtue of the Rent Acts; for in the absence of anything in the agreement indicating that the right of occupation was referable to something other than the statute which had previously supported it, the statutory tenancy continued, and here there was no such indication.

Decision of Judge Hodgson set aside.

Appeal from Judge Hodgson sitting at Wandsworth County Court.

The following statement of facts is taken substantially from the judgment of Evershed M.R. The defendant, F. J.

Courtney, was the statutory tenant of part of a dwelling-house within the scope of the Rent Acts known as 33, Criffel Avenue, Wandsworth, occupying the lower flat at a rent of £1 1s. 9d. per week. On February 23, 1952, he contracted to purchase for £650 the leasehold reversion, being a term of 99 years (less the last three days) from June 24, 1880, at a yearly rent of £12. He paid a deposit of £65 on the signing of the contract.

So far as relevant, the special conditions of sale provided in clause 4 that the date for completion was to be on or before March 17, 1952—that was little more than three weeks after the signing of the contract. Clause 5 provided: "The "tenure of the property and the estate, term, or interest sold "are as stated in the particulars and the property is sold subject "to" first, matters registered or capable of registration under the Land Charges Act, tithe and land tax, covenants and conditions contained in the lease in question, and a payment of the yearly rent of £12; and finally: "(d) As to the lower flat to the "existing tenancy of the purchaser who shall assume the rent "now or formerly paid to be the right and proper rent and shall "raise no requisition or objection in regard thereto." By clause 6: "Vacant possession of the top flat," which was empty at the relevant date, "will be given to the purchaser on "completion." Special condition 10 was: "In consideration of "the foregoing agreements by the purchaser the vendor hereby "agrees with the purchaser that the vendor will on completion "waive and release to the purchaser all and any claim or claims "that she may have against the purchaser in respect of costs"; and reference was made to certain other actions; "and further "that on completion the vendor will waive and release to the "purchaser any arrears of rent due from the purchaser to her up "to and including June 10, 1951, but reserves her right to any "arrears of rent due to her from and including" June 11, 1951.

It was provided that the Law Society's general conditions of sale should be applicable save as varied by or inconsistent with the special conditions. In the edition of 1953 it was provided by condition 6 that: "Where the purchaser is authorized (otherwise "than under a lease or tenancy entered into or created before "the date of the contract) to take physical possession of the "property before the actual completion," certain provisions should apply, including, first, an obligation on the purchaser to pay outgoings, rates, insurance and so forth, and, secondly, an obligation to pay interest on the purchase money.

As from the signing of the contract the landlord's agent closed the rent book, and although the defendant continued in occupation, he paid no rent thereafter, nor did he pay interest on the purchase money. He, apparently, alleged that he paid rates, but he made no other payment, and he stated in evidence that he thought that all outstanding arrears of rent would be taken into account on completion. The expectation that the purchase would be completed on March 17, 1952, and that, thereafter, all outstanding causes of the troubles and disputes would cease, was, however, disappointed. Extensions of time were given and the date of completion was postponed for some time; but eventually it became apparent to the landlord that the tenant was not able, or willing, or both, to complete the purchase; and, accordingly, she exercised the right, which she claimed to have under the contract, of treating it as repudiated, accepting the repudiation and rescinding the contract, the deposit of £65 being forfeited. Thereafter she brought an action claiming possession.

On the issue whether she was entitled to rescind and to forfeit, the county court judge found in her favour. He also made an order for possession on the second of the two grounds claimed, namely, that the effect of the contract of purchase had been to terminate the defendant's tenancy and to make his continued occupation referable to a mere licence to occupy as purchaser until completion, a licence which had been validly determined. The plaintiff also relied on non-payment of rent as a ground for possession but the county court judge stood over that matter.

The tenant appealed against the order for possession.

Edward Grayson for the tenant. There is no general rule that a tenancy is prima facie determined if the tenant contracts to purchase the reversion. The county court judge seems to have considered that *Turner* v. *Watts*[1] laid down such a rule, but the normal rule, it is submitted, is as in *Doe* d. *Gray* v. *Stanion*,[2] that, apart from agreement to the contrary, the tenancy continues until it is merged in the reversion on completion of the purchase. In *Turner* v. *Watts*[3] an intention to bring to an end the relationship of landlord and tenant was collected from the terms of the agreement, particular emphasis being laid on the provision that the purchaser was to pay interest on the purchase money pending completion. Payment of interest is inconsistent with an obligation to continue paying rent as a tenant, and as nothing was said about rent in that contract it was concluded that the purchasing tenant was, pending completion, allowed to continue in possession by virtue of a licence. *Turner* v. *Watts* [3] was, however, a decision which turned on the particular facts (see the comments of Somervell L.J. in *Leek and Moorlands Building Society* v. *Clark* [4]), and it does not establish a general rule. *Foster* v. *Robinson* [5] is also not in point, for in that case there was an express surrender of the tenancy.

---

[1] (1927) 44 T.L.R. 105 (C.A. 337).

[2] (1836) 1 M. & W. 695.

[3] 44 T.L.R. 105.

It is necessary to examine the particular contract of purchase in each case. Unlike the purchaser in *Turner* v. *Watts*,[6] the purchaser in the present case is not required to pay interest on the purchase price pending completion, and that is an indication that, if he is allowed to remain in possession, he must pay rent, for otherwise the landlord would get nothing for the occupation. The condition that the sale is subject to the existing tenancy of the ground floor flat is another indication that the tenancy was envisaged as surviving the signing of the contract. It is true that the defendant paid rates, and payment of rates was an obligation formerly undertaken by the landlord, but the tenant's evidence as to that was that a demand for rates had been made and had to be met, and, as the landlord had failed to pay, he himself had to do so.

Coningsby for the landlord. The signing of the contract of purchase creates in the purchaser an equitable status which is, prima facie, inconsistent with the continuation of a tenancy and, therefore, creates a presumption that the tenancy has been surrendered. The presumption can, of course, be rebutted by express agreement to the contrary, but here, as in *Turner* v. *Watts*,[6] there is no express rebuttal. The contract does not expressly preserve the tenancy, nor does it provide that it is to be surrendered. The tenant has relied on clause 5 (*d*), but it is clear that that clause, which is in more or less common form, was directed to the situation after completion and not to the question whether the tenancy was to continue to subsist pending completion. It was primarily intended to warn the purchaser of the responsibilities which would continue with him after completion. The reference to rent does not indicate that the parties envisaged the tenancy as continuing; it was intended to exclude any claim to recover overpayments of rent and to saddle the purchaser with knowledge of the statutory rent in case he should subsequently let the property. If clauses 4, 6, 8 and 10 are read together, they effectively explain the absence of any provision requiring payment of rent. The vendor was prepared to forgo payment of rent during the unusually short period between the signing of the contract and completion because she was protected by clause 6. She only pressed for arrears of rent up to the date of the contract.

---

[3] 44 T.L.R. 105.

[4] [1952] 2 Q.B. 788, 791; [1952] 2 T.L.R. 401; [1952] 2 All E.R. 492.

[5] [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.

[6] 44 T.L.R. 105.

The terms of the contract are not indicative either way as to the intention of the parties and, therefore, that intention must be ascertained from the conduct of the parties both before and after the signing of the contract and from all the surrounding circumstances. The facts here, the non-payment of rent after the contract was signed, but payment of water and general rates which were previously an express liability of the landlord, are indications that the tenancy had determined. Similarly, the closing of the rent book by the landlord and the fact that she no longer did any repairs are indications which, while perhaps less convincing, are in the same direction. Taken together, the surrounding circumstances create a strong presumption that this tenancy was determined.

The tenant has relied on *Doe* d. *Gray* v. *Stanion*[7] as establishing the normal rule, but that case is not apposite in cases where the dwelling-house in question is within the Rent Acts. A statutory tenant has no legal interest, but only a status of irremovability, and it is easier for that status to be changed by the signing of the contract than it would be in the case of a contractual tenant. The status of the occupier is not perhaps entirely clear in *Turner* v. *Watts*,[8] but there is some ground for saying that he was a statutory tenant. [Reference was made to Megarry, Rent Acts, 7th ed., p. 219.]

This is a question which turns largely on the evidence; it cannot be said that the judge went wrong in law or applied the wrong test, and, having had all the evidence before him, it is submitted that his decision ought to be upheld.

EVERSHED M.R. With all respect to Judge Hodgson, I have come to a different conclusion as regards the effect of the contract for sale of the premises in suit by the plaintiff to the defendant, on February 23, 1952. It is quite plain that before that contract was entered into there had been a number of disputes between the plaintiff (the landlord) and the defendant; and that the intention of this contract for sale was to resolve all outstanding matters between the two parties. From what I know of the general background, my sympathies in that respect, I confess, are strongly with the landlord. She has, unfortunately, been disappointed; but it does not, of course, necessarily follow (as I shall explain in a moment) that in the present proceedings she is not entitled in due course to an order for possession against the defendant. [His Lordship referred to the facts substantially as set out above and, with reference to the claim for arrears of rent, continued:] As to that, it appears from the judgment that the figures were somewhat complicated. The period dates back for some time on any view of it, and Judge Hodgson, having regard to the view which he took on the alternative branch of the case, stood over the matter of rent arrears, and it remains so adjourned now. In the view which I take, it will be necessary for that matter to be resumed, for I gather that no rent has been paid for a considerable time. It will obviously be a question for the county court judge whether, in all the circumstances of this case, the jurisdiction which he undoubtedly has to make an order for possession because of non-payment of rent should not now be exercised by him. That, however, is a matter for his discretion, and I say no more about it.

---

[7] 1 M. & W. 695.

[8] 44 T.L.R. 105.

The alternative ground on which the plaintiff succeeded before Judge Hodgson in obtaining an order for possession was that the effect of this contract was to put an end altogether to the defendant's rights as a tenant, whether contractual or statutory, and to make his possession or occupation of the lower part of the house from the date of the contract onwards referable to a mere licence, a licence which, it was said, emerged from the terms of the contract to go on occupying as purchaser until completion. *Turner* v. *Watts*[1] was cited in support of that view. Judge Hodgson accepted that submission. He held that the defendant's occupation was merely that of a licensee, that the licence had been validly determined, and that there was, therefore, no answer to the claim for possession.

[His Lordship referred to the absence of any payment of rent by the defendant from February, 1952, onwards, or of any payment of interest on the purchase money. He referred to the defendant's allegation as to the payment of rates, and said that he would assume that at some stage the defendant paid some rates in respect at any rate of part of the property. His Lordship continued:]

---

[1] (1927) 44 T.L.R. 105.

Mr. Coningsby, for the landlord, contended that, in the light of *Turner* v. *Watts* [1] (where a sitting tenant purchased the leasehold reversion) the non-payment of rent by the defendant is prima facie evidence of a surrender by operation of law, at least in the absence of something in the contract negativing such a result. I hope that I have correctly apprehended the submission. But I must reject it. In *Turner* v. *Watts* [1] provision was contained in the contract for sale for the payment of interest on the purchase price from the date of the contract until completion, and there was an express agreement by the defendant tenant that pending completion he would maintain and keep the premises in repair and pay outgoings. Salter J., in the Divisional Court, said [2]: "In the present case it is plain that the defendant is not to pay "any rent and the plaintiff said that he so understood the agree-"ment. On the other hand, the purchase money is to be paid "by September 1, or interest becomes payable from that date. "The defendant, in my opinion, has a right under the agree-"ment, as purchaser, to use and occupy the house pending "completion. She can call for a conveyance at any time on "paying the purchase money and any arrears of interest. If "she is more than a licensee and acquires any estate in the "land, it is no more than a tenancy at will. The weekly "tenancy is surrendered, either expressly or by operation of "law."

In the Court of Appeal, Scrutton L.J., examining the terms of the particular contract, said [3]: "It was an odd agreement, "but he (Lord Justice Scrutton) must hold that it was a surrender "of the weekly tenancy previously held by the defendant from the "plaintiff." In my judgment that case turned on the particular terms of that particular contract. More especially it turned on the circumstance that (as Salter J. observed) the form of the contract negatived the continued payment of rent and provided in lieu for an obligation on the purchaser's part to pay interest and to undertake such matters as repairs, insurance and maintenance. I think that it was, therefore, an exception to what would be the ordinary rule, where a sitting tenant buys the leasehold reversion. That ordinary rule was established many years ago in *Doe* d. *Gray* v. *Stanion*.[4] At page 619 of the 7th edition of

---

[2] 44 T.L.R. 107.

[3] Ibid. 337, 338.

[4] (1836) 1 M. & W. 695.

Foa's Landlord and Tenant it is stated: "Where a tenant "entered into an agreement to purchase the reversion, it was "held that such agreement, being impliedly conditional on a "good title being made, did not operate as a surrender"; and when the matter was considered by the Court of Appeal in *Leek and Moorlands Building Society* v. *Clark*,[5] Somervell L.J. said: "That case," namely, *Turner* v. *Watts*,[6] "we think turned on "the terms of the agreement and in particular a provision that "interest should accrue on the purchase price from the date of "the agreement. In the absence of any provision, express or to "be implied, an agreement to purchase would not so operate"— that is, operate to terminate a tenancy. I respectfully agree with that view, which is, indeed, binding on this court.

The remaining question, which may be considered briefly, is whether it matters that the right of occupation in the present case does not arise under a lease or contract but by virtue of the Rent Acts. In other words, is the case different where the purchaser is not a contractual tenant, but, as we say, a statutory tenant? In my judgment, the answer to that is in the negative. If there is nothing in the agreement which indicates that the right of occupation which is to continue is referable to something other than the statute which previously supported it, then, as it seems to me, the statutory tenant continues until the completion to be a statutory tenant, exactly as a contractual tenant would continue until completion to be a contractual tenant; and there will be no surrender of the statutory tenancy by operation of law, any more than there would be a surrender of a contractual tenancy.

There remains the question whether the effect of this contract was to alter the situation, and to put an end to the statutory tenancy so that the right of the tenant to continue in occupation would be referable thenceforward, not to his previously-existing tenancy, contractual or statutory, but to his right as purchaser under the contract. The first thing to note is that the contract gives no right of occupation in terms. The contract is, to put it at its highest in the landlord's favour, silent on that matter. Clause 6 of the general conditions is indeed incorporated, but that, of course, is subject to the special conditions, and in any case it speaks only of an authorization of the purchaser to take physical possession otherwise than under some tenancy; and so throws one back to discover the authorization.

---

[5] [1952] 2 Q.B. 788, 791; [1952] 2 T.L.R. 401; [1952] 2 All E.R. 492.

[6] 44 T.L.R. 105 (C.A. 337).

But I think that the matter goes further. The indications in this contract are in the opposite direction, and are to the effect that the supposed occupation, or the contemplated occupation, is that which the purchaser was already enjoying, and his right is referable to his pre-existing rights. The first indication to that effect is in clause 5 (d), which states in terms that the property is to be sold subject "as to the lower flat to the existing tenancy "of the purchaser." I agree that the main object of that clause is directed to something else, namely, to the possible problems as to the validity of the rent which the tenant had previously paid. But, nevertheless, the contract states that on completion the property sold is sold subject to the existing tenancy of the lower flat, which necessarily supposes that that tenancy, whatever its nature or quality, will be still subsisting.

Clause 6 of the special conditions speaks of "vacant "possession of the top flat" being given "on completion." The court was told that that flat was vacant; and it follows that the provision that vacant possession is to be given on completion negatives, I think, the notion that possession is to be taken under the contract of any part of the premises at any earlier date. Finally, I think that clause 10 tends in the same direction; for though the vendor expressly waives all arrears of rent up to June 10, she reserves a right to recover all arrears after that date; and there is no hint that the accrual of rent ceased at any particular date. I, therefore, am unable to resist the conclusion that by the express terms of this contract the continued statutory tenancy is contemplated. Certainly, I find nothing in the contract which negatives or displaces what I hold to be the general rule which would otherwise be applicable under the common law.

That leaves only one point. It is said that, in judging the mutual intention, regard can be had to what happened, and it may be observed that (according to such material as there is and according to the assumption which I have said that I am prepared to make) the tenant did pay some rates. Therefore, if there is, it is said, doubt as to the terms of the contract, that doubt should be resolved in accordance with the actual behaviour of the parties. In the first place, I do not think that there is doubt. It may be that the two parties did not entirely comprehend their proper relationship under the contract. But even if they misapprehended it, this court is not entitled to misconstrue the contract in order that it may share in the misapprehension. Further, it is not in any case clear that payment by the tenant of a particular item of rates is inconsistent with the true view of the contract as I construe it. It would certainly be very surprising if the effect of this contract either was, or was thought to be, such that the defendant could go on from the date of the contract to completion (which might be, as in fact it was, postponed so as to be some time after the date of the contract) without any obligation to pay anything.

For all those reasons, therefore—although I confess with some regret, because I think that the landlord seems to have been very ill-used—I think that this part of the decision in the case cannot be sustained. I repeat that that is not the end of the matter, because, in the view which I take, the case must go back to the county court in order that the matter of arrears of rent may be further investigated; and having regard to the whole circumstances and the length of time during which this rent has been in arrear, it seems to me that Judge Hodgson may think it right to make an order for possession. That, however, is a matter for his discretion (as I have already said) and not for this court. The result is that we should set aside the decision of Judge Hodgson and make an order accordingly.

DENNING L.J. When a statutory tenant has entered into a contract to purchase a house but has not yet completed the purchase, in the interval pending completion he does not automatically cease to be a statutory tenant. It all depends on the agreement between the parties. If it is agreed between them that the tenant shall no longer pay rent, but only pay interest on the purchase money, that goes a good way to show that he becomes in law a licensee and that he is not protected by the Rent Acts: see *Turner* v. *Watts*.[6] But if nothing is agreed about his position in the interval, in law he remains a statutory tenant until completion. In that case, if he cannot ultimately find the purchase money, he will no doubt forfeit his deposit, but he does not lose his statutory tenancy as well.

The difficulty to my mind, in this case, is to know what was the agreement, if any, between the parties on the point. Judge Hodgson inferred an agreement from the conduct of the parties, because after the contract of purchase the tenant did not pay rent. The landlord's agent closed the rent account in his rentbook and the tenant himself paid the rates. Those are points well worthy of consideration, but to my mind they are overpowered by the fact that there was nothing in this agreement compelling the tenant to pay any interest on the purchase money in the interval before the date fixed for completion: and it is not likely that the parties intended that the tenant should have, even for a short period, complete freedom to stay in the house without paying either rent or interest. The more likely interpretation of the facts is that the tenant was to be liable for rent in the interval, and that it was not to be paid in cash but included in the completion account. Balancing the various considerations, I agree with the Master of the Rolls that there is not sufficient in this case to outweigh the ordinary rule that, pending completion, the tenant remains a statutory tenant.

---

[6] 44 T.L.R. 105.

That decides the appeal, but it does not necessarily decide the question of possession, because it may well be that owing to non-payment of rent for all this time, an order for possession can be made on other grounds.

I agree that this appeal should be allowed.

ROMER L.J. I agree, and I only add a few words as we are differing from Judge Hodgson. It was the foundation, as I understood it, of Mr. Coningsby's argument that when a tenant enters into a contract with his landlord to purchase the reversion, he acquires an immediate equitable interest in the demised premises of a kind which is inconsistent with the view that the tenancy continues as a tenancy; and that by operation of law, accordingly, the lease is determined by surrender. From that starting point Mr. Coningsby went on to say that there is nothing in the terms of the contract between the parties in the present case which would displace that general presumption. For my part, I am quite satisfied that there is no such presumption at all. Certainly there is not where the tenant's lease is a contractual one, as was pointed out by Somervell L.J. in the passage in *Leek and Moorlands Building Society* v. *Clark* [7] to which my Lord the Master of the Rolls has referred; and I can see no reason why the position should be in any way different where the tenancy is a statutory tenancy. It seems to me that the question of surrender or no surrender is one of intention of the parties, to be discovered from the terms of the contract into which they have entered.

In *Turner* v. *Watts* [8] on the true construction of the contract and having regard to the various provisions which it contained, the court came to the conclusion that the intention of the parties was that a surrender was intended to operate. In the present

---

[7] [1952] 2 Q.B. 788, 791.

[8] 44 T.L.R. 105.

C. A.
1954

NIGHTINGALE
v.
COURTNEY.

Romer L.J.

case it seems to me that the indications to which my Lords have referred support the general rule that no surrender was in contemplation, and that no surrender was brought into operation. First, there is the very significant fact that under clause 5 of the special conditions of sale the tenancy is expressly preserved; because the property is bought subject to the existing tenancy, and even if the full operation of that provision is ineffectual, nevertheless it shows what the intention of the parties was. It is difficult to see how, on the one hand, it can be said that the tenancy determined and came to an end with the signing of the contract, and, on the other hand, that the parties contemplated it as still existing on completion.

Secondly, it should be observed that if there was a surrender which was to operate at once, the vendor would get nothing during the period prior to completion for the defendant's occupation of the property: she would get no rent because, ex hypothesi, the lease had determined; and she would get no interest on the purchase money for there was no contractual provision which provided for it; because I agree with the Master of the Rolls that clause 6 of the general conditions of sale would not operate in that contingency. It seems to me, therefore, that there is ample corroboration in the terms of this contract of sale for the view that, prima facie, no surrender was intended.

I agree that the appeal should be allowed.

Appeal allowed: no order as to costs in Court of Appeal: order for possession and costs set aside: matter remitted to the county court for further investigation as to arrears of rent: costs of first hearing and of re-hearing in county court to be in discretion of county court judge.

Solicitors: *Leopold Spero; Robbins, Olivey & Lake for Foster & Finlay, Malvern.*

E. D.

PHILLIPS-HIGGINS *v.* HARPER.

[1951 P. No. 2610A.]

1953
Nov. 23, 24, 25, 26, 27, 30; *Dec.* 1, 2, 3, 4, 7, 10.

Pearson J.

Limitation of Action—Contract—Underpayments of salary received by mistake—Action for account and for recovery of money due under contract—Claim barred after six years—Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 26 (*a*), (*b*) *and* (*c*).

In 1938 the plaintiff and the defendant made an oral agreement whereby the defendant agreed to pay to the plaintiff, in consideration of her services as an assistant solicitor, a basic weekly salary plus an annual sum to bring her total remuneration up to a proportion of the profits. From 1938 to 1950 the defendant paid the plaintiff, in addition to her basic salary, an annual sum which purported to be her proper share under the terms of the agreement and which she accepted as such. In 1951 she discovered that the annual sums paid to her had in fact been underpayments according to her understanding of the 1938 agreement. She accordingly brought proceedings against the defendant claiming a declaration as to her entitlement under the agreement; an account of the net profits of the practice and all moneys received by the defendant on account of the practice from 1938 to March, 1950; and an order for payment of any sums found due to her on the taking of such an account. The defendant pleaded, inter alia, that the action was barred by the Limitation Act, 1939, in respect of the plaintiff's claims prior to October, 1945, whereupon the plaintiff claimed that the operation of the Act was excluded or the time extended by reason of sections 19 (1) (*b*), 23 (4) or 26 (*c*) of the Act:—

Held, (1) that sections 19 (1) (*b*) and 23 (4) of the Act did not apply since on the evidence there was no trust or trust property and no fiduciary relationship between the parties, and the defendant had not acknowledged the plaintiff's right to recover any debt or liquidated sum.

Held, (2) that the plaintiff's mistake, whereby she had failed to realize that balances were due to her and whereby the right of action was concealed from her, had no relevant "consequences" for the purposes of section 26 (*c*) since the mere operation of the Act itself unless excluded was not a "consequence of a mistake" within the meaning of the subsection. The action was not for relief from the consequences of a mistake within the meaning of section 26, and accordingly the plaintiff's action was barred in respect of her claims for the years prior to 1945–46.

Semble: Section 26 (*c*) applies only where the mistake is an essential ingredient of the cause of action, so that the statement of claim should set out the mistake and pray for relief from the consequences.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

ACTION.

The plaintiff, Mrs. Rosalie Phillips-Higgins, was employed by the defendant, Henry Huband Harper, as an assistant solicitor from 1938 to 1950, after which date she became his salaried partner until June, 1951, when a dispute arose as to the terms of an oral agreement made between the parties in 1938 or 1939 fixing the plaintiff's remuneration while she remained in the defendant's employ as an assistant solicitor. The plaintiff alleged that by the terms of the agreement she was entitled to a basic salary which was to be augmented by annual lump sum payments to bring her total annual remuneration up to one-third of the net profits of the defendant's practice, while the defendant contended that by the terms of the original agreement the plaintiff was entitled in addition to her weekly salary only to such annual additional sum as would bring her total annual remuneration up to one-quarter of his profits as determined by his accountant, the agreement being varied in October, 1948, to entitle the plaintiff to a total remuneration of one-third of his profits. Each year from 1938 to 1950 the plaintiff accepted from the defendant a cheque for a sum which she believed to be her proper share according to her understanding of the agreement, but which was in fact, from 1941 to 1948, calculated on the basis that her entitlement under the agreement was one-quarter of the defendant's personal profits.

In October, 1951, the plaintiff, having discovered the alleged under-payments, started proceedings against the defendant, claiming a declaration that she was entitled under the 1938 agreement, as subsequently varied, to a total remuneration equal to one-third of the net profits of the practice from 1938 to March 31, 1950; an account of all moneys received by the defendant on account of the practice and of the net profits thereof during the material period, and an order for payment of all sums found due to her on the taking of the account. By his defence the defendant pleaded, inter alia, that the plaintiff had accepted the sums paid annually to her during the material period in full satisfaction of her claims and that thereby the accounts for those years were agreed and settled and could not be reopened, and, alternatively, that the plaintiff's claim in respect of the years prior to 1945 was barred by the Limitation Act, 1939. The plaintiff by her reply denied that the accounts were agreed and settled and contended that if they were, any agreements so made had been made as the result of a mutual mistake of fact; that the defendant had acknowledged her claim by a letter dated July 5, 1951; alternatively, that there had been a fiduciary relationship between the parties and moneys had been received by the defendant as trustee for the plaintiff. Accordingly she alleged that the operation of the Limitation Act was excluded or the period extended by virtue of sections 19 (1) (*b*), 23 (4) and 26 (*c*)[1] of the Act.

At the hearing of the action Pearson J. found on the evidence (1) that the original fraction of the relevant profit figure to which the plaintiff was entitled was one-third, and that that fraction had been reduced to one-quarter by the defendant by private instructions to his accountant and that the plaintiff did not know and did not consent to the reduction; (2) that the plaintiff's contention as to the relevant profit figure was correct; and (3) that there had been no intention on the part of the plaintiff to agree the accounts over the material period and that therefore they had not been agreed and settled.

The case is reported only on the question of the operation of the Limitation Act.

John Platts-Mills, for the defendant, relied on the Limitation Act, 1939, in respect of the period prior to 1945.

Roy Wilson Q.C. and *James Comyn* for the plaintiff. This is an action for relief from the consequences of a mistake and therefore, by virtue of section 26 (*c*) of the Act, time does not begin to run until the mistake has been discovered or could with reasonable diligence have been discovered.

---

[1] Limitation Act, 1939, s. 19 (1): "No period of limitation prescribed "by this Act shall apply to an action "by a beneficiary under a trust, "being an action—(*a*) in respect of "any fraud or fraudulent breach of "trust to which the trustee was a "party or privy; or (*b*) to recover "from the trustee trust property or "the proceeds thereof in the posses-"sion of the trustee, or previously "received by the trustee and con-"verted to his use."

S. 23 (4): "Where any right of "action has accrued to recover any "debt or other liquidated pecuniary "claim, or any claim to the personal "estate of a deceased person or to any "share or interest therein, and the "person liable or accountable therefor "acknowledges the claim or makes "any payment in respect thereof, the "right shall be deemed to have "accrued on and not before the date "of the acknowledgment or the last "payment."

S. 26: "Where, in the case of any "action for which a period of limita-"tion is prescribed by this Act, either "—(*a*) the action is based upon the "fraud of the defendant or his agent "or of any person through whom he "claims or his agent, or (*b*) the right "of action is concealed by the fraud "of any such person as aforesaid, or "(*c*) the action is for relief from the "consequences of a mistake, the "period of limitation shall not begin "to run until the plaintiff has dis-"covered the fraud or the mistake, "as the case may be, or could with "reasonable diligence have discovered "it: . . ."

1953

PHILLIPS-HIGGINS v. HARPER.

[PEARSON J. On the face of it this is an action for money due under a contract.]

The relief claimed must depend on the facts of the case, e.g., where there is a mistake in the words of a document the appropriate remedy is rescission; where money has been paid under a mistake of law, as in *In re Diplock*,[2] the appropriate action is one to recover the money; where money has been paid under a mistake of fact the action is one to recover the money paid. In the present type of case, where an underpayment has been accepted over a period of years as the result of a unilateral mistake of fact, the only action available to the plaintiff is one for an account. An action for an account is primarily an equitable remedy. Section 26 of the Act has given statutory effect to the principles laid down by the courts of equity in respect of equitable claims. Those courts regarded mistake as coming within the same rule as fraud. They were not bound by the Limitation Acts, but they applied them by analogy. In *Brooksbank* v. *Smith* [3] it was held that trustees who, by mistake, had transferred certain stock to a person not entitled to it, might file a bill to compel the transferee to retransfer it at any time within six years after the discovery of the mistake although more than six years had elapsed since the date of the transfer. It was decided there that in cases of mistake the period of limitation (which by analogy was held to bar the remedy in the courts of equity) began to run from the time when the mistake was discovered. "In cases of fraud," said Alderson B.,[4] "the courts of equity hold that the statute runs from "discovery. . . . Mistake is, I think, within the same rule as "fraud."

[PEARSON J. That case was explained in *In re Robinson*,[5] where Warrington J. distinguished it.]

The decision in *In re Robinson* [5] did not concern the postponement of the period of limitation, and therefore on that point *Brooksbank's* case [6] is still good law.

[PEARSON J. In *Baker* v. *Courage & Co.*,[7] which was decided in 1910, before the Limitation Act, 1939, and was a common law action for money paid by mistake, it was held that time ran from the date of the payment.]

The position in that case was that the plaintiff could with due diligence have discovered the mistake. In *Denys* v. *Shuckburgh*,[8] where a tenant in common of certain mines had, in consequence of a mistake, received less than his proper share of the profits of the mines for more than six years, and filed a bill for an account, it was held that he was only entitled to an account for the period limited by the statute, and not from the date of the original mistake, because he had had the means with proper diligence of removing the misapprehension of fact under which he laboured. In the course of his judgment Alderson B. said [9] that a court of equity, "unless the mistake be clear, and the party be without "blame or neglect in not having discovered it earlier, ought, in "the exercise of a sound discretion, to adopt the rule given by "the statute law as a guide." Alderson B. regarded the bill for an account in that case as an action for relief from the consequence of a mistake. The principle of that case applies here, and here the plaintiff is blameless; there is no substance in the suggestion that she could have discovered the mistake earlier.

---

[2] [1948] Ch. 465; [1948] 2 All E.R. 318.

[3] (1836) 2 Y. & C.Ex. 58.

[4] Ibid. 60.

[5] [1911] 1 Ch. 502.

[6] 2 Y. & C.Ex. 58.

[7] [1910] 1 K.B. 56.

[8] (1840) 4 Y. & C.Ex. 42.

[PEARSON J. I have to consider whether the decision in *Denys* v. *Shuckburgh*,[8] which is similar to this case, survives the Limitation Act, 1939, and Warrington J.'s decision in *In re Robinson*.[10] This is in principle a common law action, and it is merely accidental that the remedy sought is an equitable one. In *In re Robinson* [10] an equitable claim, which was in the nature of a common law action for money had and received, was held on the analogy of the Limitation Act to be barred after the lapse of six years.]

The question in *In re Robinson* [10] was whether or not it was an equitable claim at all.

The Limitation Act is a consolidating Act and section 26 embodies the established principles laid down by the courts of equity. If the Act is more than declaratory it is submitted that in so far as there are amendments in the law they apply the equitable principles to common law actions. This must be so as the words so closely follow the decisions of the equity courts. It is not necessary for an action to be based on mistake to bring it within the actual wording of paragraph (*c*) of section 26. The words of paragraph (*c*) are not limited in the same way as those of paragraphs (*a*) and (*b*). Paragraph (*a*), which concerns fraud alone, deals specifically with actions based on fraud. Where an action is not based on fraud, but where the right of action is concealed by fraud, an action can be brought within paragraph (*b*), as in *Beaman* v. *A.R.T.S. Ld.*[11] Paragraph (*c*) deals with both fraud and mistake and is the only paragraph concerned with mistake. As there are no limiting words in that paragraph it is submitted that any action comes within the paragraph provided that the relief which is sought is clearly relief from the consequences of a mistake. It is not necessary that the action should be based on mistake. An action for an account and an action for money due are the only types of action available to the plaintiff in such a case as this, and if they are not actions for relief from the consequences of a mistake within the meaning of the paragraph then a plaintiff, who has accepted an under-payment by mistake for more than six years, can never recover even though he be completely blameless and had no means of discovering the mistake earlier. That cannot be the law because it would be grossly unfair and would be contrary to the rules laid down in the equity courts. Relief from the consequence of a mistake may take many forms.

---

[8] 4 Y. & C.Ex. 42.

[9] Ibid. 53.

[10] [1911] 1 Ch. 502.

[11] [1949] 1 K.B. 550; 65 T.L.R. 389; [1949] 1 All E.R. 465.

[PEARSON J. Where more than six years have elapsed there is a great hardship on a defendant. Mistake, if innocent, raises different considerations of policy from fraud.] [His Lordship referred to *Solle* v. *Butcher*.[12]]

The paragraph should be construed widely to give effect to the principles laid down by the courts of equity with respect to equitable claims. Since the passing of the Limitation Act the distinction between such claims and common law actions has ceased to be of importance. The rules of equity now apply equally to equitable claims and common law actions. The courts of equity did not restrict their rule to cases where mistake was the basis of the form of action, and it is submitted, therefore, that this action for an account is in substance an action seeking relief from the consequences of a mistake so that it comes within the paragraph, and the plaintiff is entitled to an account in respect of the period prior to 1945 as well as in respect of the subsequent period.

Platts-Mills in reply. This is an action for an account. It is not the type of action contemplated by the paragraph. There are many instances of mistake which do not fall within the limited wording of the paragraph. Furthermore, if the plaintiff's contention were right the Limitation Act would be of very limited application. Fraud and mistake have always been treated differently: *Bulli Gold Mining Co.* v. *Osborne*[13]; *Kelly* v. *Solari*[14]; *Cooper* v. *Phibbs*.[15]

Cur. adv. vult.

---

[12] [1950] 1 K.B. 671; 66 T.L.R. (Pt. 1) 448; [1949] 2 All E.R. 1107.

[13] [1899] A.C. 351; 15 T.L.R. 257.

[14] (1841) 9 M. & W. 54.

[15] (1867) L.R. 2 H.L. 149.

Dec. 10. PEARSON J. after stating the facts and deciding the other issues in the case in favour of the plaintiff continued: I come now to the question which arises under the Limitation Act, 1939. Prima facie section 2 (2) and (7) of the Act apply here. If they apply, I hold that they bar any account in respect of the years prior to the year 1945/46 but that they do not bar an account in respect of that year, because the liability to pay the supplemental salary and to furnish an account of the net profit and of the resulting total salary did not arise until after March 31, 1946, and therefore did arise within six years before the issue of the writ in October, 1951. It was, however, contended on behalf of the plaintiff that the limitation was excluded or the period was extended by section 19, 23 or 26 of the Act.

[His Lordship read section 19 and continued:] I hold, on the view which I take of the relevant salary agreement made between the parties in 1938, that there was no trust and no trust property and no fiduciary relationship.

On the question of acknowledgment, the opening words of section 23 (4) are, "Where any right of action has accrued to "recover any debt or other liquidated pecuniary claim." The claim must be a claim for a debt or other liquidated pecuniary sum and the acknowledgment must be an acknowledgment of that claim. I find that the defendant did not by anything said in this case in the course of the correspondence or any other documents acknowledge the plaintiff's right to recover any debt or other liquidated claim, nor did he (if this could be material in any way) acknowledge any liability to account to the plaintiff.

Section 26 is concerned with the postponing of the limitation period in the case of fraud or mistake. It is right in construing this provision, of course, to consider the pre-existing law, and a number of previously decided cases were referred to, including *Brooksbank* v. *Smith*[1]; *Denys* v. *Shuckburgh*[2]; *Baker* v. *Courage & Co.*[3]; and *In re Robinson*.[4] Reference was also made to a passage in the judgment of the Court of Appeal in *In re Diplock*.[5] In the end it seemed to me that the previous law did not afford much help. The Act is not a mere consolidating Act, but (as appears from its title) "an Act to consolidate with "amendments certain enactments relating to the limitation of "actions and arbitrations." Section 26 (*c*), which is the material provision, effects at least one amendment, because it overrides the decision in *Baker* v. *Courage & Co.*[6]

---

[1] (1836) 2 Y. & C.Ex. 58.

[2] (1840) 4 Y. & C.Ex. 42.

[3] [1910] 1 K.B. 56.

[4] [1911] 1 Ch. 502.

[5] [1948] Ch. 465; [1948] 2 All E.R. 318.

In construing the section it is to be observed that fraud and mistake are dealt with quite differently. [His Lordship read section 26 and continued:] In regard to fraud, there is provision (a) where the action is based upon fraud—for instance, if an action is to recover damages for fraudulent misrepresentation—or (b), that very wide provision, where the right of action (which may be wholly independent of fraud) is concealed by the fraud of "any such person as aforesaid," that is to say, the defendant or a person claiming through him; but there is not in respect of mistake any provision similar to (b). The section does not apply to the case of a right of action which is concealed from the plaintiff by a mistake. What, then, is the meaning of provision (c)? The right of action is for relief from the consequences of a mistake. It seems to me that this wording is carefully chosen to indicate a class of actions where a mistake has been made which has had certain consequences and the plaintiff seeks to be relieved from those consequences. Familiar examples are, first, money paid in consequence of a mistake: in such a case the mistake is made, in consequence of the mistake the money is paid, and the action is to recover that money back. Secondly, there may be a contract entered into in consequence of a mistake, and the action is to obtain the rescission or, in some cases, the rectification of such a contract. Thirdly, there may be an account settled in consequence of mistakes; if the mistakes are sufficiently serious there can be a reopening of the account.

In my opinion, the mere operation of the Limitation Act unless excluded by this section is not a relevant consequence for the purpose of the section. If it were, then any concealment of a right of action from the plaintiff by a mistake would be intended to be covered by this section and the provision (b) in respect of fraud should have been applied to mistake also. Moreover, I think that it is right to say that if there would be no consequence except the operation of the Limitation Act, and the operation of the Limitation Act is excluded, then there is no consequence at all. In this case the mistake, in my judgment, has had no relevant consequence for the purposes of this section. As the statement of claim shows, the plaintiff's claim is to recover moneys due to her under a contract, and the cause of action is the same as if she had sued for each unpaid balance on its due date. By reason of the mistake she failed to realize that the balance was due to her and by that mistake the right of action was concealed from her. But that is not sufficient. Probably provision (c) applies only where the mistake is an essential ingredient of the cause of action, so that the statement of claim sets out, or should set out, the mistake and its consequences and pray for relief from those consequences. In this case the statement of claim sets out that sums became due and that only a smaller amount of £x has been paid, and the prayer is for an account to ascertain the sums still due and for payment of them when so ascertained. This action is not for relief from the consequences of a mistake within the meaning of section 26.

---

[6] [1910] 1 K.B. 56.

No doubt there are certain anomalies which result. As Mr. Wilson pointed out, it is odd that a person who has by mistake paid too much can take advantage of the section whereas a person who has by mistake received too little and made no protest cannot take advantage of the section. There may be other anomalies also. But, in my judgment, the carefully chosen wording of the provision (c) must have its proper effect notwithstanding any resulting anomalies. No doubt it was intended to be a narrow provision, because any wider provision would have opened too wide a door of escape from the general principle of limitation by six years' lapse of time, which is, of course, a reasonable and normally salutary principle, as Mr. Platts-Mills demonstrated by reference to this case, where the parties' memories have grown dim as to long past events and possibly some documents which might have been material have in the course of time perished.

[His Lordship read the form of declaration proposed and gave judgment for the plaintiff for the sum of such amounts of salary, if any, as should on the taking of an account between the parties on the basis of the declaration be ascertained to have become due to the plaintiff in respect of the years ending March 31, 1946 to 1950, and not to have been paid.]

Judgment for the plaintiff.

Solicitors: *Walters & Hart; Edwin Coe & Calder Woods.*

C. A.
1954
Mar. 30, 31.

Somervell, Morris and Romer L.JJ.

The defendant appealed only from the judge's decision on the facts in favour of the plaintiff. There was no cross-appeal by the plaintiff from the judge's decision that her action in respect of her claims for the years prior to 1945–46 was barred under the Limitation Act, 1939.

Harold Heathcote-Williams Q.C. and *John Platts-Mills* for the defendant.

Roy Wilson Q.C. and *James Comyn* for the plaintiff.

The appeal was dismissed.

Solicitors: *Edwin Coe & Calder Woods; Walters & Hart.*

A. W. G.

1954
Jan. 25.

Lord Goddard C.J., Byrne and Parker JJ.

PLUNKETT *v.* ALKER.

Education—" Parent "—Meaning—Verminous child—Child's condition due to mother's neglect—Mother's liability as " parent "—Education Act, 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *ss.* 54 (6), 114 (1).

" Parent."

A boy, a pupil at a school maintained by a local education authority, was found to be in a verminous condition, having previously been cleansed under a compulsory cleansing order made by the Medical Officer of Health under section 54 (3) of the Education Act, 1944. The boy's mother was charged with an offence under section 54 (6) of the Act, the local authority alleging that the boy's verminous condition was due to her neglect. The magistrate found the charge proved and convicted her. On appeal on the ground that the father and not the mother was the " parent " liable where both parents were living together with their child:—

Held, that the mother was a " parent " within section 114 (1) of the Act of 1944 and on the facts found was rightly convicted.

London County Council v. *Stansell* (1935) 154 L.T. 241 questioned.

Case stated by Liverpool stipendiary magistrate.

On June 27, 1953, the respondent, the clerk to the Liverpool education authority, preferred an information against the appellant, Mrs. Catherine Plunkett and her husband, James Plunkett, alleging that they were the parents of one Christopher Plunkett, a

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

1954

PLUNKETT v. ALKER.

pupil at Prince Rupert (Margaret Street) County School, Liverpool, whose person, after cleansing under the order of the Medical Officer of Health had been carried out, was again found to be infested with vermin while attending the school, and that his condition was due to neglect on the part of the appellant and her husband contrary to section 54 (6) of the Education Act, 1944.[1] At the hearing of the information the respondent withdrew the allegation against the father.

The following facts were proved or admitted before the magistrate. The appellant lived with her husband and her son, Christopher, at Jasmine Street, Liverpool. Christopher was at all material times a pupil at schools maintained by the Liverpool education authority. On June 1, 1951, the boy's hair was examined by one Edna Smith, a school nurse employed by the education authority, and found to be infested with vermin. A notice was served on the appellant and her husband requiring them within 24 hours to cleanse the boy's hair. On June 5, his hair, not having been cleansed, was duly cleansed under a compulsory cleansing order, and on the same day a statutory notice was sent to the parents drawing their attention to the provisions of section 54 (6) of the Act. On June 11, the nurse visited the appellant, who admitted having received the notice, and the nurse instructed her in the cleansing of hair and the use of insecticides. On May 15, 1953, the boy's hair was examined by the nurse, and was again found to be infested with vermin. The appellant admitted to the nurse that she had not attended to the boy's hair for a week. The condition of the boy's hair was due to neglect on the part of the appellant.

It was contended by the appellant that where the parents of a child were living together in the same house with their child the father was the parent of the child for the purposes of the Education Act, 1944, and that, accordingly, proceedings against a mother were not competent.

---

[1] Education Act, 1944, s. 54 (6): "If, after the cleansing of the "person or clothing of any pupil has "been carried out under this section, "his person or clothing is again "found to be infested with vermin or "in a foul condition at any time "while he is in attendance at a "school maintained by a local education authority . . . and it is proved "that the condition of his person or "clothing is due to neglect on the "part of his parent, . . . the parent ". . . shall be liable on summary "conviction to a fine not exceeding "twenty shillings."

S. 114 (1): "'Parent,' in relation "to any child or young person, in"cludes a guardian and every person "who has the actual custody of the "child or young person."

1954

PLUNKETT v. ALKER.

It was contended by the respondent that the appellant was the parent of the child within the meaning of section 54 (6) and section 114 (1) of the Act.[1]

The magistrate was of opinion that the contention of the respondent was correct, and that the appellant was properly charged and was guilty of the offence. Accordingly he convicted the appellant, who now appealed.

J. Collinson for the appellant. The proceedings against the appellant were not competent since where the father and mother of a child are living together with their child the father is the "parent" for the purposes of the Education Act, 1944. This case is indistinguishable from *London County Council* v. *Stansell*,[2] where a mother was charged under section 87 (4) of the Education Act, 1921, the Act then in force, with an offence identical with that in the present case. In that case the information was dismissed, the justices holding that when the father was not absent he was the proper person to be charged. In coming to their decision the justices considered *Woodward* v. *Oldfield*[3] and *Hance* v. *Burnett*,[4] in both of which cases a mother had been held to be the "parent" for the purposes of the Act. In *Woodward* v. *Oldfield*[5] the father was in prison and a defective child, over seven years of age, was residing with and in the actual custody of the mother, and she was held to be the person who could take steps to send the child to a special school. In *Hance* v. *Burnett*[6] it was decided that a mother could be held liable for not sending a child to school when the father was away at sea. In *London County Council* v. *Stansell*[7] the justices regarded those two cases as authorities for the proposition that for the purposes of the Act the "parent" was the one who had the de facto custody of the child. The Divisional Court upheld the justices' decision in that case.

It is true that the wording of section 54 (6) of the present Act is slightly different from that of the comparable section under the 1921 Act, where the words were: "Where . . . the parent of "the child allows him to get into such a condition that it is again "necessary to proceed under this section, the parent shall be "liable to a fine . . ." Under section 54 (6) of the Act of 1944 the words are, "if . . . it is proved that the condition of his

---

[1] See note on p. 421.

[2] (1935) 154 L.T. 241.

[3] [1928] 1 K.B. 204; 43 T.L.R. 488.

[4] (1880) 45 J.P. 54.

[5] [1928] 1 K.B. 204.

[6] 45 J.P. 54.

[7] 154 L.T. 241.

"person or clothing is due to neglect on the part of his parent" the parent shall be liable, but it is submitted that that change in wording has not altered the gravamen of the offence and that the law remains as stated in *London County Council* v. *Stansell*,[7] and that that decision is binding on the court. Had Parliament wished to reverse that decision it would have done so by plain words in the Education Act, 1944.

If, contrary to that contention, the court holds that the Act of 1944 has effected a change in the law, it is submitted that the same considerations should move the mind of the court as in *Stansell's* case.[7] The father has the legal custody of the child; he is entitled to exercise control over its education and religion; if the child is taken away from him the action for loss of services is with the father. Therefore he ought in law to be the "parent" responsible for the purposes of the Act.

[LORD GODDARD C.J. It may be that, even though the child is living with both parents, the father may not see much of the child, perhaps on account of his business, so that even though he has the custody and control of the child it may be the mother who is guilty of neglect.]

Nevertheless, it is submitted that if the father has the actual custody of the child at the time when the offence is committed he is the parent liable unless it can be proved that he had the custody in name only.

D. McNeill for the respondent. On the wording of section 54 (6) of the Education Act, 1944, the appellant was properly charged, and on the facts found by the magistrate she was properly convicted. *London County Council* v. *Stansell*,[7] being a decision under an earlier Act, does not apply to this case, which is brought under a different Act. Under section 87 (4) of the Education Act, 1921, the "parent" chargeable was the person who allowed the child to get into a verminous condition. The word "allows" indicates "control," and therefore the court, in deciding cases brought under that section, had to direct its mind to deciding which parent had control of the child. Questions of custody were not strictly relevant to *Stansell's* case.[7] By the words of section 54 (6) of the present Act, which has replaced section 87 (4) of the Act of 1921, the element of neglect has been imported into the offence. For the purposes of section 54 (6) the word "parent" means, in relation to a child, "that responsible "person, who is a parent, against whom neglect has been proved." Even though where both parents are living together with their child the father has the custody and control of the child, that does not necessarily make him personally responsible if the condition of the child arises from neglect. If the father were the only person liable the section might be unenforceable, as it might be extremely difficult to prove any personal neglect against the father.

---

[7] 154 L.T. 241.

[PARKER J. What would your argument be if in these circumstances proceedings were brought against the father?]

If he could show that he was not personally responsible for the child's condition he would have an answer to the charge.

[LORD GODDARD C.J. The question is whether there is a distinction between the word " neglect " in the Act of 1944 and the words " allows to get into such a condition " in that of 1921. Under the latter Act it had to be shown that the person allowed the child to get into a verminous condition.]

Collinson replied.

LORD GODDARD C.J. [after stating the facts]: The word " parent " is defined in section 114 (1) of the Act of 1944 as follows: " ' Parent,' in relation to any child or young person, " includes a guardian and every person who has the actual custody " of the child or young person." That section does not say that the mother is not a parent. It states whom the word " parent " includes, and I take it that under that section if a child is living with, say, an aunt or grandparent so that that person has the actual custody of the child, she might be answerable under subsection (6) of section 54. It is at least a reasonable interpretation of the words in the definition section to assume that the legislature is drawing a distinction between actual custody and legal custody. The words used are " actual custody," which seems to indicate a person who at the time of the summons has the child in his or her custody. I think that the word " actual " is put in for that purpose. It must also be remembered that, unless the contrary intention appears, the Interpretation Act, 1889, requires one to read the singular as including the plural. Therefore, the word " parent " must be construed as " parents " unless the contrary intention appears.

If, therefore, this case was free of authority I should have no hesitation in holding that if the magistrate finds as a fact, as he must be taken to have done in the present case, that the condition of the child was due to the neglect of the mother, she falls within the section because she is a parent. If the child is living with, and is in the care of, the mother, it can in my opinion be said that she has the actual custody though she may not have the legal custody; but whether she has the actual custody or not, the definition section does not exclude the mother, but only defines who may be included in the word "parent."

The appellant was found to be responsible for the condition of the child and was fined, but it was argued that this court is bound by the decision in *London County Council* v. *Stansell*,[1] which was a decision under section 87 of the Education Act, 1921. The material words of that section were: "(1) A local "education authority for elementary education may direct their "medical officer . . . to examine in any public elementary "school . . . the person and clothing of any child attending the "school, and, if on examination the medical officer . . . is of "opinion that the person or clothing of any such child is infested "with vermin . . . the local education authority may give notice "in writing to the parent of the child, requiring him to cleanse "properly the person and clothing of the child within 24 hours."

Subsection (4) provided: "Where, after the person or "clothing of a child has been cleansed by a local education "authority under this section, the parent of the child allows "him to get into such a condition that it is again necessary to "proceed under this section, the parent shall be liable to a fine "not exceeding 10s."

In *Stansell's* case[1] the mother was summoned, and the justices, on the authority of *Hance* v. *Burnett*[2] and *Woodward* v. *Oldfield*,[3] held that the father was the person who ought to have been summoned, and not the mother; and on appeal this court, of which I was a member, held that the justices came to a right decision. Lord Hewart C.J., giving judgment, said[4]: "The justices were clearly right. They came to the conclusion "that the 'parent' referred to in section 87 of the Education "Act, 1921, where the father and mother were living together "and the child was living with both of them, was the father. "They have set out their reasons for their decision, and I think "that they have come to the right conclusion for the reasons "which they have given." Both Singleton J. and I agreed.

It is said that *Stansell's* case[4] is binding on us and that we must give effect to it and hold that the father alone can be summoned. I say at once that, having further considered that case, I feel great doubt whether the decision was right. The

---

[1] (1935) 154 L.T. 241.

[2] (1880) 45 J.P. 54.

[3] [1928] 1 K.B. 204; 43 T.L.R. 488.

[4] 154 L.T. 241, 242.

Interpretation Act, 1889, does not seem to have been brought to the attention of the court or the court did not remind itself of that Act. The justices who decided *Stansell's* case[4] said that they followed *Hance* v. *Burnett*[5] and *Woodward* v. *Oldfield.*[6] *Woodward* v. *Oldfield*, decided in 1927, was a case of a defective child over seven years of age residing with and in the actual custody of her mother. The father was serving a sentence of penal servitude. The mother was held by the court to be the parent of the child within the meaning of the Education Act, 1921, who could take the steps required under the Act with regard to attendance at a special school, because she had the custody of the child while the father was in prison. In *Hance* v. *Burnett*[7] it was decided that a mother could be made liable for not sending a child to school if the father was a seaman and was away at sea at the time, because the father could not possibly attend to it. One matter about which I have some doubt is that in many of those offences under the Education Act, 1921, it might be that both father and mother were liable, but we are now considering a subsequent Act in which the word "neglect" is used. If the condition of the child is due to the neglect of the mother, who is undoubtedly a parent and is not excluded by the definition section of the Act from being a parent, I have great difficulty in seeing why the mother does not commit the offence mentioned in the section. Supposing that the father had been summoned. He might have said that the question was not whether he had allowed it, but whether the condition of the child was due to his neglect. He might have said that he did not wash the child nor brush the child's hair, all that being done by the mother; that he was not called upon to examine the child every day or every week to see if the child's head was infested, and that he had not neglected his duty as a parent because he had not inspected the child to that extent, because he was entitled to rely upon his wife attending to those matters. I can see that in very many cases under the Act the father would have a defence by saying that he had not been negligent. I have great doubt whether *London County Council* v. *Stansell*[8] was rightly decided, but as there is now another Act which contains other words, I think that we can treat this case as res integra and put our own construction on the words of the section.

---

[4] 154 L.T. 241, 242.

[5] 45 J.P. 54.

[6] [1928] 1 K.B. 204.

[7] 45 J.P. 54.

[8] 154 L.T. 241.

1954

PLUNKETT
v.
ALKER.

Lord Goddard C.J.

I am far from saying that if both parents were summoned they might not both be convicted, provided that the court came to the conclusion that both had neglected the child; but in deciding whether there has been neglect the court would have to take into account, as in all cases of negligence, all the circumstances of the case. I can quite well see that in a case of this sort justices could come to the conclusion that a father had not neglected the child though the mother had. In some circumstances they might find that the mother had not neglected the child though the father had. One knows that almost every month there are cases under section 1 of the Children and Young Persons Act, 1933, in which a father and mother are charged with neglecting the children so as to cause unnecessary suffering or injury to health apart from actual cruelty. There the words of the statute certainly refer to "any person who has the custody, "charge or care of the child." In theory of law the father, if he is living in the house, is the person who has the custody, and may be said to have the charge and to some extent the care of the child, but the mother can also be charged under that section, and frequently is, and I have never yet heard it suggested that the mother cannot be charged if she is responsible for the neglect of the child, although her husband may also be charged.

In the present case, therefore, it can be said that the magistrate having found as a question of fact—and it is not suggested that there was not evidence on which he could so find—that the condition of the child's head was due to the neglect of the mother, she is answerable under this section; and that accordingly the magistrate came to a right decision on the facts with the result that this appeal fails.

BYRNE J. I agree. There is such a difference between the wording of section 54 (6) of the Act of 1944 and section 87 (4) of the Act of 1921 that this court is not bound by the decision in *London County Council* v. *Stansell*,[8] and I am of opinion that the magistrate was right.

PARKER J. I agree with both judgments.

Appeal dismissed.

Solicitors: *W. F. Foster, Hedge & Clare for A. Stephen Cawson, Liverpool; Town Clerk, Liverpool.*

---

[8] 154 L.T. 241.

C. A.

1953
Oct. 19.

Somervell,
Denning and
Romer L.JJ.

BREWER STREET INVESTMENTS LD. *v.* BARCLAYS WOOLLEN CO. LD.

Landlord and Tenant — Vendor and purchaser — Negotiations subject to contract—Agreement to alter premises—Negotiations abortive—Claim for cost of alterations—Claim implied in law—Restitution.
Building—Licence—Extras—Separately ordered—Presumed within free allowance.

The defendants, who were prospective tenants of certain premises, and the plaintiff landlords were in negotiation as to the terms of a lease. Agreement on the principal matters had been reached subject to contract. The plaintiffs undertook to make certain alterations in the premises desired by the defendants, who accepted responsibility for the cost. The parties were eventually unable to agree on a term of the lease concerning a possible future sale of the premises to the defendants and, as a result, the matter went off, and work on the alterations, which had progressed to a considerable extent, was stopped.

The plaintiffs, having discharged their liability to their contractor in respect of the alterations, sued the defendants for the amount paid as moneys "paid by the plaintiffs to the use of "the defendants at the defendants' request in respect of the cost "of alterations":—

Held, that (1) the circumstances negatived a presumed intention of the parties that the defendants should pay the cost of the alterations only on the condition that a lease was entered into;

(2) it was through the defendants' own course of conduct that the lease had gone off, and, since they had undertaken responsibility for payment of the alterations at a time when they knew that either party could resile and decide not to conclude a lease, they were not entitled, by reason of any implication, to put up a defence to the action. Even if the lease had gone off through circumstances for which neither party could be regarded as responsible, that would not have afforded a good defence to the action.

Per Denning L.J. The legal basis for the plaintiffs' claim was not on a quantum meruit; the work had been abandoned before it was finished, nor for breach of contract, for there had been no breach, but on a request implied in law, that was to say, a claim in restitution. The test of liability in such cases was: On whom, in all the circumstances, should the risk fall?

Held, also, that in considering the principle that a plaintiff could not recover for work illegally done by reason of the absence of a licence, an item which was not within the specification covered by the licence but was separately ordered was prima facie outside the principle in *J. Dennis & Co. Ld.* v. *Munn* [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616, which was distinguished.

[Reported by Miss ELAINE JONES, Barrister-at-Law.]

APPEAL from Morris L.J. sitting as an additional judge of the Queen's Bench Division.

The defendants were the prospective tenants and the plaintiffs the landlords of premises at 62, Brewer Street, London, W.1. In a letter dated January 9, 1951, the defendants offered to take a lease of the premises for a term of 21 years at a rent of £2,750 a year, with an option to purchase within 60 days of the signing of the lease at a price of £40,000. The plaintiffs' agents, in a letter dated January 10, 1951, agreed as to the duration of the lease and the rent, but as to the option to purchase made a counter offer of a right to first refusal at the same figure.

The negotiations had been expressed to be subject to contract, but had proceeded so far, and with such mutual confidence, that both parties assumed that a lease would be granted. The prospective tenants, who were anxious to enter by the end of March, desired that certain alterations to the premises should be made. In correspondence between the parties the plaintiffs agreed to make the alterations by their contractors. Among the alterations so desired was the fitting of an extra door in the lift.

On January 23, 1951, the plaintiffs' solicitors sent to the defendants' solicitors a draft lease containing a paragraph giving the defendants a right of first refusal if, within two years from the execution of the lease, the landlords should desire to sell the fee simple. In a letter of January 26, 1951, written by their architect, the defendants agreed to be responsible for the cost of the alterations. On January 31, 1951, the defendants' solicitors returned the draft lease inserting, by revision, an option to purchase the premises. Negotiations continued, and the alterations were put in hand. Under cover of a letter of February 6, 1951, the draft lease was returned from the plaintiffs' solicitors, amended in purple, with the right to first refusal reinstated. As a result it became clear that the defendants were unwilling to enter into a lease on terms acceptable to the plaintiffs and that the plaintiffs were unwilling to grant a lease acceptable to the defendants. The work on the alterations, which had progressed to a considerable extent, was stopped. The plaintiffs paid to their contractors the cost of the work up to that date, and sought in these proceedings to recover it from the defendants.

Morris L.J., in a reserved judgment, held that the defendants were liable.

The defendants appealed.

Gilbert Dare for the defendants. The agreement between the parties was subject to contract, that is to say, subject to the granting of a lease. The phrase "subject to contract" covers all the terms of the agreement, including the term by which the defendants undertook to bear the cost of the alterations. As the negotiations for the lease broke down, the whole agreement, including the term as to the alterations, was without foundation and of no effect. The cost of the alterations must, therefore, fall on the landlords who benefited by them. The negotiations went off through the fault of the plaintiffs in refusing to grant a lease on the terms of the original offer. Alternatively, a term was implied into the contract by which the defendants agreed to pay for the alterations on the understanding that the plaintiffs would at all times remain ready and willing to grant a lease on the terms originally discussed. In *Jennings & Chapman Ld.* v. *Woodman, Matthews & Co.*[1] it was held that a landlord, who was unable to grant a lease, was liable for alterations done to the premises before his incapacity became apparent. A landlord who refuses to grant a lease cannot be in a better position than one who is unable to do so.

In any event, the absence of a licence covering the making and installation of an extra lift door renders the agreement illegal to that extent, and the defendants are not, therefore, liable to pay the cost of that part of the alterations: *Bostel Bros. Ld.* v. *Hurlock.*[2] It is no answer to say that a licence might have been obtained, for a licence in respect of building work cannot be retrospective: *Jackson, Stansfield & Sons* v. *Butterworth.*[3]

Montague Waters for the plaintiffs. The trial judge was right in holding the defendants liable to the plaintiffs for the cost of the alterations.

[DENNING L.J. Do you say that you can recover on the contract although the work was never finished?]

There is a claim on a quantum meruit.

[DENNING L.J. *Sumpter* v. *Hedges* [4] was to the contrary; in the circumstances the only remedy may be in restitution.]

But in the present case the work was stopped at the express request of the defendants. The judgment in the court below is nevertheless open to objection in that the judge was wrong in applying the "fault" test. He suggested that if negotiations had broken down through the fault of the plaintiffs, in that they did not remain willing to grant a lease on the basis of their original offer, they would not have been entitled to recover the cost of the alterations. It is submitted that no such term should be implied into the contract and that such a term would not have been agreed to by the plaintiffs: see *Broome* v. *Pardess Co-operative Society of Orange Growers (Est. 1900) Ld.*[5] Further, it is inherent in the circumstances in which the promise was made that either party could, for good or bad reasons, or for no reasons at all, refuse to enter into a binding lease: *Luxor (Eastbourne) Ld.* v. *Cooper.*[6] As the matter was at all times subject to contract there was no fundamental change of situation brought about by the breakdown of negotiations and no question of "fault" could arise.

---

[1] [1952] 2 T.L.R. 409.

[2] [1949] 1 K.B. 74; 64 T.L.R. 495; [1948] 2 All E.R. 312.

[3] (1948) 64 T.L.R. 481; [1948] 2 All E.R. 558.

[4] [1898] 1 Q.B. 673.

[Romer L.J. Suppose that, whilst parties were in negotiation for a lease, the landlords allowed the prospective tenants to go on the land and spend money on it in anticipation of a lease. If the landlords subsequently broke off negotiations for no reason at all they could not get the benefit of the work without paying for it. Equity would give a remedy.]

[Denning L.J. Whether equity would do so or not, the common law, nowadays, would give the prospective tenants the right to recover the value of the work done in an action for restitution.]

If the submission that fault is irrelevant is wrong, then it is submitted that on the facts of this case it was the defendants' fault that the matter went off, and they are for this reason liable for the cost.

[Somervell L.J. Is it not an old principle that a man is not allowed to take advantage of a condition brought about by himself?]

[Denning L.J. That was laid down by Sir Edward Coke[7] and was affirmed in *New Zealand Shipping Co. Ld.* v. *Société des Ateliers et Chantiers de France.*[8]]

In any event, the negotiations did not break down through any fault of the plaintiffs, and the trial judge's finding on this point is unassailable.

On the question of illegality, no licence was required until the lift door was brought to the premises and the process of affixation was commenced. Further, the making of the lift door was work outside the main contract; it was ordered and executed separately, and as such was within the licence free limit: *J. Dennis & Co. Ld.* v. *Munn.*[9] Even if the work were not executed separately, it is sufficient that it was ordered separately: in this connexion reliance is placed on a dictum of Somervell L.J. in *Muir* v. *James.*[10]

---

[5] (1940) 56 T.L.R. 430; [1940] 1 All E.R. 603.

[6] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.

[7] 2 Co.Litt. 206b.

[8] [1919] A.C. 1, 7.

Somervell L.J. On the claim as a whole Mr. Dare, for the defendants, took two points. He submitted, first, that the contract with regard to these alterations should be read as subject to a lease being entered into. Assuming that he is wrong, his second point is that the plaintiffs could not recover unless they could show that they were at all times ready and willing to grant a lease on the terms set out in their original letter "subject to "contract," namely, the first refusal at £40,000 over the period of the lease, and that the contract which they themselves submitted showed that they were not ready and willing to do that. The plaintiffs rely on the fact that the defendants did not ask them to revert to the original term but reinserted in effect a provision for an option.

On the first point, which was taken in the pleadings and which was decided against the defendants, the judge in the court below was plainly right. I cannot see any reason for implying into this contract a term that the defendants were to be under no liability unless there was a lease, or, in other words, that the confirmation of their responsibility should be read as subject to their entering into a lease. As was pointed out by Romer L.J. in the course of the argument, the whole matter of the lease being subject to contract, the defendants could have resiled without giving any reason. It seems impossible that they could have expected the plaintiffs to continue with this work on the basis that they would have to pay for alterations which the defendants wanted if the defendants entirely on their motion decided not to go on with the lease. That point fails.

One then approaches the question on the basis of whether any facts are shown which would entitle the defendants to say that they were not, in the events which have happened, liable to fulfil the responsibility which they undertook by the letter of January 26, 1951. The judge approached the matter in this way. He said: "In approaching the present case it may be "useful to consider two situations just to test the matter.

---

[9] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.

[10] [1953] 1 Q.B. 454; [1953] 2 W.L.R. 423; [1953] 1 All E.R. 494.

C. A.

1953

Brewer Street Investments Ld. v. Barclays Woollen Co. Ld.

Somervell L.J.

" Supposing that the work had all been done, and supposing that " the defendants had then said that they had changed their mind " and they were not going to take a lease at all. There was no " binding contract, and they would have been entitled for no " reason, or for a bad reason, to refuse to enter into a lease. " It would seem strange if, in those circumstances, the defendants were not obliged to pay. Take another case: supposing " that the work was all done and that the defendants remained " willing to take a lease on the terms in principle agreed, and then " supposing that the plaintiffs said: ' Well, we have changed our " ' minds: we are not going to grant you a lease,' or ' We have " ' found someone else who will pay more,' it would seem strange " if, in those circumstances, the defendants were obliged to pay. " It seems to me that much turns upon the reason why the " whole of this matter came to an end, and the correspondence " seems to me to show that the reason was that the defendants " insisted on having an option though an option had never been " promised, so for that reason the whole of the negotiations came " to an end. I think that the basis of the promise entered into by " the defendants might well have been that the plaintiffs should " remain in principle agreeable, subject, of course, to contract, " to grant a lease on the general lines of the letter on p. 4 of " the correspondence. The implied term as pleaded in this case, " to which I have referred in my judgment, wholly fails. There " could not have been an implied term on such a wide basis. " The highest I think that it could be stated from the point of " view of the defendants was as I have put it, namely, that the " promise was on the basis of the plaintiffs remaining of the " same mind as they had revealed before the promise to pay for " items of work was made. Although the plaintiffs by the first " draft of their lease were seeming to depart from it, the " correspondence seems to me to show that the real reason why " this matter went off was that the defendants were insisting on " an option." [His Lordship referred to the course of the argument in the court below and continued quoting the judgment of Morris L.J.:] " They had never been promised an option. " It had been made clear that no option would be given, and " therefore on that part of the case in my judgment the defendants have failed to show that they have a defence to this " claim." I agree with that construction of the correspondence, but if one considers the matter in principle the defendants undertook responsibility for this work at a time when they knew that either side could resile and decide not to conclude a lease.

The only question of law, therefore, would be whether the events which have happened, by reason of some implication, entitle the defendants to put up a defence. The judge below clearly thought that if the matter had gone off because the plaintiffs had changed their mind or had found someone else who would pay more, the defendants would have such a defence. It is unnecessary to decide that point, though there seems to be a strong argument for that view. It is plain that the matter went off because of the defendants' own course of conduct in adhering to the condition that they should get an option when it had been made clear to them that the plaintiffs were not willing to grant an option. If Mr. Dare is right in saying, in the alternative, that the lease went off through circumstances for which neither party can be regarded as responsible, that is in the ordinary course of negotiations and misunderstandings, I still think that that would not afford a good defence to this claim. I wish to guard the words which I use because an earlier case which came before this court shows that the area is somewhat difficult. Each case must be judged on its own circumstances. There might be a case in which the circumstances were such, and the benefits conferred on the landlord if the matter went off were such, that, even although it was not through the deliberate action of the landlord that the matter went off, the defendant still might have a defence. One should not seek to anticipate circumstances which may arise. For these reasons the decision in the court below on the main claim was right and the appeal fails.

It was then said that there was a defence in respect of the extra door of the lift in that it was said that no licence had been obtained for that, that the work was therefore illegal and, on principles which have been applied to this particular area more than once in reported cases, the plaintiffs could not recover for work illegally done because of the absence of a licence.

Mr. Waters took the point that this sum of £48 10s. is within the amount of work which could be done under the regulations without a licence. *J. Dennis & Co. Ld.* v. *Munn* [1] decided that, where a licence had been granted for a certain amount on a specification and that amount had been exceeded, the builder could not claim that the amount of the free allowance should be added to the amount covered by the licence. In *Muir* v. *James* [2] the question was raised as to the application of that principle to extras, that is to say, something not in terms covered by the original specification but separately ordered. There may be cases in which an extra may be separately ordered and may be sufficiently separable from the original work to be plainly coverable by the free allowance. Although the extra is separately ordered, outside the terms of the specification, it may be so involved in the specification as to fall under the principle of *J. Dennis & Co. Ld.* v. *Munn.*[3] An extra is, however, prima facie outside the principle of *J. Dennis & Co. Ld.* v. *Munn,*[3] and there are no facts proved here which negative that position, the onus being on the defendants. For these reasons this appeal should be dismissed.

---

[1] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.

[2] [1953] 1 Q.B. 454; [1953] 2 W.L.R. 423; [1953] 1 All E.R. 494.

DENNING L.J. This case raises questions of considerable interest. The landlords seek to recover from the prospective tenants the moneys which they have had to pay to their own contractors for the work done on the alterations before the negotiations for the lease broke down. The question is whether they can do so.

It is not easy to state the legal basis of the landlords' claim. The difficulty arises because, although the prospective tenants agreed to pay the cost of the alterations, nevertheless those alterations were never completed. The work was abandoned before it was finished. Once the negotiations for a lease broke down, both sides realized that the work must be stopped. It was a very sensible thing to do, but it means that the landlords cannot sue for the price as on a completed contract. Nor can they sue the prospective tenants for damages for breach of contract, because the prospective tenants have not been guilty of a breach. Let me give an instance. One item of the work was a lift door to be made, fixed and installed for the lump sum of £48 10s. At the time when the work was abandoned, the lift door had been made in the provinces but it had not been transported to London, let alone fixed or installed. Nevertheless the landlords have had to pay to their contractors the full sum of £48 10s., presumably by way of damages, and they seek to recover it from the prospective tenants. They clearly cannot recover on a quantum meruit as ordinarily understood. The way they put their claim on this item and the others in the statement of claim is money paid on request. The prospective tenants, however, made no request in fact to the landlords to pay the money. Their request, if any, was to pay on completion of the work, and it was not completed.

---

[3] [1949] 2 K.B. 327; 65 T.L.R. 251; [1949] 1 All E.R. 616.

In these circumstances, the proper way to formulate the claim is on a request implied in law, or, as I would prefer to put it in these days, on a claim in restitution.

It is clear on the facts that the parties proceeded on a fundamental assumption—that the lease would be granted—which has turned out to be wrong. The work done has been wasted. The question is: on whom is the loss to fall? The parties themselves did not envisage the situation which has emerged and did not provide for it; and we do not know what they would have provided if they had envisaged it. Only the law can resolve their rights and liabilities in the new situation, either by means of implying terms or, more simply, by asking on whom should the risk fall. This is how the court approached a similar question in *Jennings & Chapman Ld.* v. *Woodman, Matthews & Co.*,[4] and I think that we should approach the question in the same way.

Morris L.J. gave a reserved judgment in which he put the matter in a way which appeals to me. He asked himself: what was the reason for the negotiations breaking down? If it was the landlords' fault, as, for instance, if they refused to go on with the lease for no reason at all, or because they demanded a higher rent than that which had been already agreed, then they should not be allowed to recover any part of the cost of the alterations. Even if the landlords derived no benefit from the work, they should not be allowed to recover the cost from the prospective tenants, seeing that it was by their fault that the prospective tenants were deprived of it.

On the other hand, if it was the prospective tenants' fault that the negotiations broke down, as, for instance, if they sought a lower rent than that which had been agreed upon, then the prospective tenants ought to pay the cost of the alterations up to the time they were stopped./ After all, they did promise to pay for the work, and they should not be able to get out of their promise by their own fault, even though the alterations were not completed. It is a very old principle laid down by Sir Edward Coke that a man shall not be allowed to take advantage of a condition brought about by himself.[5]

I do not think, however, that in the present case it can be said that either party was really at fault. Neither party sought to alter the rent or any other point which had been agreed upon. They fell out on a point which had not been agreed at all. From the very beginning the prospective tenants wanted an option to purchase, whereas the landlords were only ready to give them the first refusal. Each of them in the course of the negotiations sought on this point to get more favourable terms—the prospective tenants to get a firm option to purchase, the landlords to give a first refusal of little value—but their moves in the negotiations can hardly be considered a default by one or other.

---

[4] [1952] 2 T.L.R. 409.

[5] 2 Co.Litt. 206b.

What, then, is the position when the negotiations go off without the default of either? On whom should the risk fall? In my opinion the prospective tenants ought to pay all the costs thrown away. The work was done to meet their special requirements and was prima facie for their benefit and not for the benefit of the landlords. If and in so far as the work is shown to have been of benefit to the landlords, credit should be given in such sum as may be just. Subject to such credit, the prospective tenants ought to pay the cost of the work, because they in the first place agreed to take responsibility for it; and when the matter goes off without the default of either side, they should pay the costs thrown away. There is no finding here that the work was of any benefit to the landlords, and in the circumstances the prospective tenants should, I think, pay the amount claimed.

Mr. Waters argued that the test laid down in *Jennings & Chapman Ld.* v. *Woodman, Matthews & Co.*[6] was wrong. It was not right, he said, to ask whose fault it was, or on whom should the risk fall, because each side had an absolute right to withdraw from the negotiations: and could not be said to be at fault in doing so. He referred to *Luxor (Eastbourne) Ld.* v. *Cooper*,[7] and argued that, even if the landlord, for instance, demanded a higher rent and thus caused the negotiations to fall through, he could still recover the cost of the alterations. I do not think that that is right. Estate agents are employed on the footing that they get a large commission if a sale is completed, but nothing if it is not. They take the risk of the deal falling through. The cases on the subject are, therefore, illustrations of the same test: on whom in all the circumstances should the risk fall?

In the present case I think that the risk should fall on the prospective tenants and that they should pay the costs of the alterations. On the question of illegality I have nothing to add to what has been said. I agree that the appeal should be dismissed.

---

[6] [1952] 2 T.L.R. 409.

[7] [1941] A.C. 108; 57 T.L.R. 213; [1941] 1 All E.R. 33.

ROMER L.J. I agree. As has been pointed out by Somervell L.J., this case falls to be decided on its particular facts and circumstances. On those facts and circumstances I hope that I shall not be regarded as unsympathetic to the defendants if I say that in my opinion they have only themselves to blame for the judgment which was delivered against them. The truth of the matter is that they were in a very great hurry to get into these premises because the lease of their own premises was running out, and because of that hurry they did things which in the normal course they would not have done.

On January 26, 1951, the defendants' architect wrote to the plaintiffs unequivocally accepting responsibility for the cost of the work as mentioned. I am unable to read that letter as amounting in any sense to a conditional acceptance of responsibility. The defendants knew what the position was in regard to the lease. They knew that this formidable difference had already arisen between themselves and the plaintiffs with regard to the option. But they wanted to get on; they wanted the work done; and I am satisfied that they were prepared to take the risk of the matter of the lease not coming eventually to a satisfactory conclusion. If one is asked to imply something into the acceptance—that the responsibility should only arise or be enforceable if a lease was to be granted—two questions suggest themselves: first, what lease? (because none had been agreed), and secondly, what would have been the reaction of the landlords had that condition been introduced in terms? I, for myself, have no doubt that had the defendants said, "We want "you to put this work in hand but we are only going to pay for "it provided we eventually get a lease which will be agreed "between us," the plaintiffs would not have had the work done at their own risk as to cost. Taking the whole of the circumstances, the dates, the urgency of the matter, the fact that the defendants themselves paid directly for part of the electrical work without any suggestion of their liability in that regard being conditional, I have no doubt but that in common phraseology they were "taking the risk" for their own purposes in the hope that they would get the benefit of it if, as they hoped and thought, a lease was finally agreed and granted. As the negotiations failed, solely because the defendants right up to the end insisted on getting that which they had been told already the plaintiffs were unwilling to give, namely, an option, I cannot see how they can escape responsibility by seeking to put the blame on the shoulders of the plaintiffs. It may well be that if,

C. A.
1953

Brewer Street Investments Ld. v. Barclays Woollen Co. Ld.

after this work had been done, the plaintiffs got the benefit of it, assuming it to be work which improved the value of the property, and had then said "We will not grant a lease at all," the defendants would not have been without remedy. That was not the position in this case. The facts led to an entirely different result. I accordingly agree that the appeal should be dismissed. On the other points which have arisen I have nothing to add.

Appeal dismissed.

Solicitors: *Lucien Fior; Arnold Lee & Co.*

GLUCHOWSKA *v.* TOTTENHAM BOROUGH COUNCIL.

1954
Jan. 19, 29.

Lord Goddard C.J., Byrne and Parker JJ.

Landlord and Tenant—Rent tribunal—Furnished premises—Rent fixed by tribunal and registered—Excess rent received for part of premises —Whether offence committed—"Those premises"—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 4 (1) (*a*).
Statute—Construction—Penal Act—Act to be strictly construed.

Section 4 of the Furnished Houses (Rent Control) Act, 1946, provides:—"(1) Where the rent payable for any premises is "entered in the register under the provisions of this Act, it shall "not be lawful to require or receive—(*a*) on account of rent for those "premises in respect of any period subsequent to the date of such "entry, . . . payment of any sum in excess of the rent so entered. "(2) Where any payment has been made or received in contravention of the foregoing subsection, the amount thereof shall be "recoverable by the person by whom it was made."

In 1949, a rent tribunal, on a reference by a tenant of a contract of letting, fixed the rent of three furnished rooms and a kitchen in a dwelling-house, and the rent was entered in the register in accordance with section 3 (2) of the Act. In 1951, one room and a kitchen, part of the premises to which the registered rent applied, were let by the appellant, who had become the owner of the house, at a rent exceeding the registered rent. The appellant having been convicted on informations charging her with receiving excessive rents contrary to section 4 of the Act:—

Held (Lord Goddard C.J. dissenting), that the words "those "premises" in section 4 (1) must be construed according to their natural meaning as referring to the unit of letting for which the rent was originally fixed and registered; that the rent received by the appellant was in respect of a different unit of letting from that

---

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

to which the registered rent applied, albeit part of it, and therefore no offences had been committed.

Per Lord Goddard C.J., the court is entitled to expand the word "premises" in section 4 (1) to include "part of the premises."

CASE STATED by Middlesex justices sitting at Tottenham.

On June 4, 1953, 20 informations were preferred by the respondents, the Tottenham Borough Council, against the appellant, Mrs. Wladyslawa Kazmiera Gluchowska, that she between December, 1952, and April, 1953, received excessive rents contrary to section 4 of the Furnished Houses (Rent Control) Act, 1946.

At the hearing of the informations the following facts were proved or admitted. In 1949, the appellant's predecessor in title, one Michael Gluchowski, let three fully-furnished rooms and a basement kitchen in a dwelling-house at Willoughby Lane, Tottenham, together with the use of a bathroom, to one August Sikors. On a reference to the rent tribunal for the district the rent was fixed at £1 7s. per week, and on March 10, 1953, the rent was entered in the register provided for by section 3 of the Act. At some time before September 22, 1951, the appellant became the owner of the dwelling-house, and on September 22, 1951, she let fully furnished one room and a kitchen to one Arnold Hayes on a weekly tenancy at a rent of £2 per week, that rent being subsequently reduced to £1 15s. The room and kitchen were part of the larger premises to which the registered rent applied. The appellant and her family occupied the other two rooms. Between December 6, 1952, and April 18, 1953, the appellant received from Hayes weekly payments of either £2 or £1 15s. on account of rent for the room and kitchen, the total sum received by the appellant in excess of the registered rent being £9. On January 28, 1953, Hayes referred the contract of letting to the rent tribunal for the district. The tribunal adjourned the reference sine die.

It was contended before the justices on behalf of the appellant that on the true construction of the Act no offence had been committed as the premises on account of which rent was received were not the premises for which a maximum permitted rent was registered.

It was contended for the respondents that the whole included the part and, therefore, rent received on account of the premises let was received on account of the registered premises; and that the contract between the appellant and Hayes defeated the object of the rent tribunal and contravened the spirit of the Act.

The justices, being of opinion that the respondent's contentions were correct, convicted the appellant, fined her £2 in respect of each offence—a total of £40—and further ordered her to repay the sum of £9 received from Hayes on the 20 dates specified in the informations in excess of the registered rent.

J. F. Donaldson for the appellant landlord. When a contract of letting of furnished premises has been referred to a rent tribunal and the rent for those premises has been fixed and registered, a landlord who subsequently lets a part of the premises to which the registered rent applies at a rent higher than the registered rent does not commit an offence under section 4 of the Act. The words "those premises" in the section clearly refer back to the actual premises specified in the contract of letting referred to the rent tribunal. They ought not to be expanded to mean "those "premises or any part thereof," since so to do would be to write words into the Act. This is a penal section which must be strictly construed. Had Parliament intended the words "any "part thereof" to be included in the section it would have been simple to have said so.

A tribunal's decision in respect of that unit of letting referred to it applies in rem, and any rent received on account of that unit of letting under a subsequent contract of letting which is in excess of the registered rent is illegal and recoverable no matter who the parties to the contract may be: *Rex* v. *Fulham, Hammersmith and Kensington Rent Tribunal, Ex parte Gormly.*[1] But a landlord who lets different premises can charge what he pleases, subject to the tenant's right to apply to the tribunal for a reduction. In this case the premises specified in the contract of letting referred to the tribunal, and to which the registered rent applied, were four rooms. The two rooms let to Hayes comprise a different unit of letting and therefore the appellant landlord, by receiving a rent of £2 a week for those two rooms, has not received rent in excess of the registered rent on account of the registered premises.

J. P. Widgery for the respondent borough council. On a proper construction of section 4 of the Act a landlord who receives rent for part of registered premises which is in excess of the registered rent for the whole premises commits an offence. The words "those premises" in section 4 should be read to include the words "or any part thereof." Any other construction would be contrary to the spirit of the Act. The purpose of registration and the penal provision is to render the rent tribunal's decision far-reaching. The maximum recoverable rent is intended to refer to future lettings. If it is only binding in rem in respect of the identical terms of the contract of letting which was the subject of the original reference the effect of the tribunal's decision will be virtually nil. It is submitted that the registered rent applies where the letting is on different terms.

---

[1] [1952] 1 K.B. 179; [1951] 2 T.L.R. 1037; [1951] 2 All E.R. 1030.

[LORD GODDARD C.J. It might be said that it could not be the object of the legislature that the section should be construed in such a way that, if £1 7s. is the proper rent for four rooms, £2 could be the proper rent for two rooms.]

In Maxwell on Interpretation of Statutes, 9th ed., p. 279, it is stated that "the rule of strict construction, when invoked, "comes attended with qualifications and by other rules no less "important, and it is by the light which each contributes that the "meaning must be determined. Among them is the rule that "that sense of the words is to be adopted which best harmonizes "with the context and promotes in the fullest manner the policy "and object of the legislature." In this case, having regard to the objects and purposes of the Act, the words "those premises" must have been intended to include part of the premises. It would not be violating the principles of construction to give them that meaning. Common sense dictates that they should be so construed.

[LORD GODDARD C.J. It offends common sense not to give the words that construction, but when one construction creates an offence and one does not, the law leans against the construction resulting in an offence being committed. Can you cite any authority in support of your argument?]

There might be difficulty in supporting the conviction if the words in the section were clear, but it is submitted that in their context and on the facts the words "on account of rent for those "premises" should be given the wider meaning to include "or "any part thereof."

Donaldson replied. [Reference was made to *London County Council* v. *Aylesbury Dairy Co.*[2]]

Cur. adv. vult.

January 29. LORD GODDARD C.J. Parker J. will read the first judgment.

---

[2] [1898] 1 Q.B. 106, 109.

1954

GLUCHOWSKA
v.
TOTTENHAM
BOROUGH
COUNCIL.

PARKER J. The judgment which I am about to read is the judgment of Byrne J. and myself.

This is an appeal by way of case stated by justices for the county of Middlesex before whom the appellant was charged under 20 informations with receiving on 20 occasions excessive rents contrary to section 4 of the Furnished Houses (Rent Control) Act, 1946. Though the total of the excess amounted to only £9, which was ordered to be repaid to the tenant, the appellant was fined no less than £40 (a fine which seems out of all proportion to the offences found proved) and ordered to pay £5 5s. costs. [His Lordship read section 4 of the Act, stated the facts, and continued:] The short point for the decision of the court is whether the receipt by the appellant of those rents constituted offences, and this depends on the meaning to be given to the words "receive on account of rent for those "premises" in section 4 of the Act of 1946.

"Those premises" in that section clearly refer back to the premises the subject of the contract referred to the tribunal, and to the specification of those premises which has under section 3 (2) (*a*) to be entered in the register. The specification entered in the register in the present case is of the original letting, namely, three rooms and kitchen in the basement together with use of a bathroom. That is the unit in respect of which the rent is fixed and registered. The receipts from Hayes were not on account of rent for that unit of letting, but for a different unit, namely, one room and kitchen, albeit part of the premises originally let. Accordingly, on the natural meaning of the words in the section it would appear to us that no offences were committed.

It is urged, however, for the respondents that we should construe the words "those premises" in section 4 to mean "those premises or any part thereof" in that, it is said, it would be contrary to the spirit of the Act, and to common sense, if a landlord were to be permitted to relet part of the premises at a rent in excess of that registered for the whole premises. It is true that in penal as well as in other statutes words should be read in their widest sense if to do otherwise would result in failure to suppress the mischief aimed at by the legislation. At the same time, to use the words of Wright J. in *London County Council* v. *Aylesbury Dairy Co.*,[1] the court "ought not to do "violence to its language in order to bring people within it, but

---

[1] [1898] 1 Q.B. 106, 109.

"ought rather to take care that no one is brought within it who "is not brought within it in express language." In our opinion, even if the words in section 4 are capable of being read in the wide sense contended for, we ought not to read them in that sense. A tenant in the position of Hayes can at once refer his contract to the tribunal, and on such a reference the tribunal would have to fix a rent for the premises let to him, and cause it to be registered. It would then become an offence for the landlord to receive rent for the premises so let in excess of that registered rent. Accordingly, it is unnecessary, in order to suppress the mischief aimed at, to read the words in the wide sense contended for by the respondents. Accordingly, we would allow this appeal.

LORD GODDARD C.J. While I regret that there should be a difference of opinion in the court on a matter which, as here, does not admit of appeal, since I have formed a definite opinion I feel bound to express it with diffidence though not with hesitation.

Unless I am satisfied that there is a casus omissus in the Act, it would appear to me unfortunate to be obliged to hold that while it would be an offence to let three rooms and a kitchen at a rent in excess of that which is registered, no offence is committed if only one of the three rooms and a kitchen is let at a rent which exceeds that registered in respect of the four. I entirely agree that the court ought not to read into an Act, and more especially into one which carries penal consequences, words which are not there because it would seem convenient so to do or to effect what a court may think Parliament intended, but has failed to say; but it is possible when construing a statute to expand the literal meaning of words if it appears that an extended meaning must have been intended. By way of illustration I will cite two cases, *Hewett* v. *Hattersley*,[2] where the words "so condemned" in a prosecution relating to unsound food were read as "so liable to be condemned," and secondly, *Barnard* v. *Gorman*,[3] where, in a prosecution under section 186 of the Customs Consolidation Act, 1876, the court had to construe the words "the offender may either be detained or proceeded "against by summons." The word "offender" was held to include "a person who is suspected on reasonable grounds to have "committed the offence. . . ." This is but an application of the maxim "ut res magis valeat quam pereat." There is another well-known maxim that the greater includes the less, a rule of logic which has become a rule or maxim of law. These considerations, in my opinion, entitle the court to expand the word "premises" so as to include any part of the premises without reading additional words into the section. Moreover, the matter can be regarded in another though, perhaps, rather technical light. As is well known, at common law rent issues out of the land demised and out of any part of it. The registered rent takes the place of the contractual rent and so issues out of any part of the property demised. Accordingly, it issued as much out of any one of the rooms as it did out of all. One of the rooms out of which a registered rent of £1 7s. per week issued has been let at a rent in excess of that sum, and that seems to me to support the view that it is possible to read the word "premises" as including part of the premises, or, in other words, to show that in this statute the greater does include the less.

---

[2] [1912] 3 K.B. 35; 28 T.L.R. 433.

[3] [1941] A.C. 378; 57 T.L.R. 681; [1941] 3 All E.R. 45.

I would mention one other matter on which I differ from the opinion of the other members of the court. I cannot agree that because the tenant can take the new contract before the tribunal and obtain a reduction, that this gets rid of the mischief aimed at by the section. The tenant appears to have paid the increased rent for a period of 20 weeks. If it is an overpayment he can recover the excess by action, but if the tribunal were now on a fresh reference to reduce the rent the reduction would be effective only from their decision and he, accordingly, would not be able to recover the excess which he has paid. On another point I am in complete agreement with my brothers. I regard the penalties inflicted by the justices as excessive, and, indeed, I would say oppressive, especially when it is remembered that had the convictions been affirmed the tenant could have recovered the amount adjudged to have been overpaid. As the convictions will be quashed it is not necessary to say more about this matter.

Appeal allowed.

Solicitors: *Windsor & Co.; Town Clerk, Tottenham.*

1954
Jan. 20,
21, 29.

REGINA *v.* BRIGHTON AND AREA RENT TRIBUNAL.
Ex parte SLAUGHTER AND ANOTHER.

Lord Goddard C.J., Byrne and Parker JJ.

Landlord and Tenant—Rent tribunal—Standard rent—Business premises with living accommodation above—Covenant against use of premises otherwise than as shop—Tenant carrying on business and living on premises—Jurisdiction of tribunal to fix rent—Rent and Mortgage Interest Restrictions Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3)—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1.

Landlord and Tenant—Restrictive covenant—Long contrary user.

In 1950, premises, consisting of a shop on the ground floor with a self-contained flat over it, were let for the first time as a whole for 21 years at a rent of £350 a year. The lease contained a covenant that the tenant would not permit the premises to be used otherwise than for the business of a greengrocer. The tenant carried on a greengrocer's business in the shop and lived in the flat above. On an application by the tenant under section 1 (1) of the Landlord and Tenant (Rent Control) Act, 1949, to a rent tribunal to fix a reasonable standard rent for the premises, the landlords objected that, in view of the covenant in the lease, the premises were not a dwelling-house to which the Act applied and that the tribunal had no jurisdiction:—

Held that, if the covenant debarred the use of the whole of the premises as a dwelling-house so that the tenant could be restrained from such user, that was conclusive against the premises being a dwelling-house, but if it appeared that the premises were let for the purpose of the tenant living in them, provided he was not a service tenant, then they came within the Act. In the present case, so long as the tenant carried on a greengrocer's business it was impossible to say that he was in breach of his covenant because he lived on the premises, and, therefore, the tribunal had jurisdiction to fix the rent.

Whiteley v. *Wilson* [1953] 1 Q.B. 77; [1952] 2 T.L.R. 802; [1952] 2 All E.R. 940 applied.

MOTION for order of mandamus.

By a lease dated October 16, 1950, the Selsdon Trust Ld. let premises at 195, Tarring Road, Worthing, to one Jack Rumsey for 21 years from September 29, 1950, at a rent of £350 per annum. At some time prior to August 15, 1951, the Selsdon Trust Ld. assigned their rights as lessors to Dawes & Co. (Mitcham) Ld., the present landlords. On August 15, 1951, Rumsey assigned the lease with the consent of the landlords to the applicants, Percy Harry Philip Slaughter and his wife Muriel Betty Slaughter. In April, 1953, the applicants applied to the Brighton and Area Rent Tribunal to fix a standard rent for the premises under section 1 of the Landlord and Tenant (Rent Control) Act, 1949. A hearing took place and the matter was strongly contested, the landlords contending that the tribunal had no jurisdiction.

At all material times the premises consisted of a shop, office, storeroom and kitchen on the ground floor, forming shop premises, and on the first floor, approached by an outside staircase, there were three rooms together, and a W.C., forming a self-contained flat. The premises, until the date of the lease in question, had never been let as a whole and the two floors were separately assessed for rates, the rateable value of the ground floor being £51, and of the first floor £19. The applicants carried on business in the shop premises and made their home in the flat.

By clause 2 (11) of the lease it was provided: "The lessee will "not use the demised premises or any part thereof save as a "shop only nor permit the demised premises or any part thereof "to be used otherwise than for the business of a fruiterer green-"grocer and florist . . ."

The landlords contended that the tribunal had no jurisdiction because, on a true construction of the lease, the applicants were only entitled to use the premises as a greengrocer's shop, and that they were in breach of covenant in using part of it as a dwelling-house. On July 21, 1953, the tribunal informed the parties that they had decided that they had no jurisdiction, and they dismissed the application.

The tenants thereupon moved for an order of mandamus directing the tribunal to hear and determine the application.

Norman Stogden for the applicants. Section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, provides that the Rent Acts shall apply to a dwelling-house notwithstanding that part of the premises is used for business purposes, and it matters not how much is used for one purpose and how much for the other: *Whiteley* v. *Wilson*.[1] It is necessary for the applicants to show that although the lease purports to let a shop, and does not mention a dwelling-house, nevertheless the applicants are entitled to live in the premises. If there is any ambiguity in the lease it ought to be construed in favour of the applicants. *Hicks* v. *Snook*[2] shows that one has to look at the actual use of the premises in order to determine whether part of it comes within the

---

[1] [1953] 1 Q.B. 77; [1952] 2 T.L.R. 802.

[2] (1928) 27 L.G.R. 175.

1954

Regina
v.
Brighton
and Area
Rent
Tribunal.
Ex parte
Slaughter.

Rent Acts. This is a question of law. [Reference was also made in this connexion to *Vickery* v. *Martin*,[3] in which, to the knowledge of the landlords, the premises demised were used as a boarding-house, but were held to be subject to the Rent Acts.] The fact that the applicants are living in the premises is sufficient to make them a dwelling-house regardless of the fact that they are also used for business purposes. It is submitted that, apart from the covenant in clause 2 (11) of the lease, the premises were let as a shop and dwelling-house. The question is whether the covenant makes any difference. If the landlords wished to prevent the tenants from living in the premises they would have had to make it quite clear by express covenant. [*Kitchen's Trustees* v. *Madders*[4] was referred to.] One must look to see what is the position in each case. Here as a matter of common sense the covenant clearly was not intended to prevent the living quarters from being used as a dwelling-house. If this lease were to be interpreted against the applicants it would mean that it was a mere sham and an attempt to contract out of the Rent Acts, which the landlords were not permitted to do. Moreover, even if the lease were to be construed as the landlords contended, the prohibition against the user of the premises as a dwelling-house had gone by the landlords permitting such user. When they consented to the assignment of the lease to the applicants nothing was said about not using the premises for living in.

It is not for the tribunal to consider the dominant user of the premises. If part of it was a dwelling-house then they were bound to fix the rent.

H. B. Grant for the landlords. It is agreed that the first point is whether the lease conferred a tenancy which is protected. In Megarry on the Rent Acts, 7th ed., p. 59, it is made clear that if premises are let for business purposes the tenant cannot claim that they have been converted into a dwelling-house merely because someone lives in the premises. *Wolfe* v. *Hogan*,[5] which is there referred to, contains a dictum of Denning L.J. to the effect that if the lease contains an express provision as to the purpose of the letting it is not necessary to look further. Apart from clause 2 (11), the purpose of the lease is further underlined by clause 2 (19), which provides that the lessee will not keep the premises closed for more than 14 days at any one time in a year.

---

[3] [1944] K.B. 679; 60 T.L.R. 513; [1944] 2 All E.R. 167.

[4] [1950] Ch. 134; [1949] 2 All E.R. 1079.

[5] [1949] 2 K.B. 194; [1949] 1 All E.R. 570.

In *Court* v. *Robinson*,[6] where there was a covenant that the tenant should use the premises only as a working-men's social club, the Court of Appeal held that the premises were let for business purposes and not as a separate dwelling.

[LORD GODDARD C.J. In *Court* v. *Robinson*[6] Denning L.J. seems to be saying that although the tenant did not commit a breach by living in the house, still the premises were not a dwelling-house. But in *Burns* v. *Radcliffe*[7] Moore L.J. said that if the nature of the premises was not incompatible with the residence of the tenant the whole premises could be regarded as his dwelling-house.]

The court must not look beyond the terms of a lease which are unambiguous. Here the terms are clear and one cannot look to see what may have been in the minds of the parties. Just as in *Court* v. *Robinson*[8] Asquith L.J. held that a "working-men's "social club" was not an ambiguous expression such as to permit one to deduce the intentions of the parties as to user from extrinsic evidence, so here, it is submitted, if the terms of the lease are unambiguous, extrinsic evidence of the actual user should not be permitted.

Even if there were doubt as to the purpose of the lease, clause 2 (19), which provides that the lessee will not keep the premises closed for a longer period than 14 days at any one time during a year, makes it apparent that the premises were intended to be used as a shop only.

[LORD GODDARD C.J. This seems to be a clear case of a person derogating from his own grant, because if you are right it means that the dwelling-house is sterilized.]

J. P. Ashworth for the tribunal. The case raises difficult problems on the authorities. It is necessary to consider the subject-matter of the lease and to look at the purpose for which the whole premises are let. There is a distinction between the boarding-house case and *Hicks* v. *Snook*.[9] All houses do not cease to be dwelling-houses because a business is carried on there. One may have a block of offices and the unit as a whole let for business purposes, and in such a case the premises do not become a dwelling-house because someone is living in them.

Where there is no evidence of dominant user, the question is whether the premises are a shop with living accommodation or a dwelling-house.

---

[6] [1951] 2 K.B. 60, 73.

[7] [1923] 2 I.R. 158, 162.

[8] [1951] 2 K.B. 60, 69.

[9] 27 L.G.R. 175.

[LORD GODDARD C.J. *Vickery* v. *Martin*[10] shows that one cannot go into dominant user.]

The court there found that the premises were essentially a dwelling-house. In *Whiteley* v. *Wilson* Romer L.J. said[11]: "The "question whether the premises in the present case did or did not "constitute a dwelling is one, I think, of fact, and one on which "the judge arrived at a conclusion after approaching the matter "from the right angle. He found that it was a dwelling-house, "and that to my mind was an end of the case, because it is a "dwelling-house within the first part of the subsection, and it is "not excluded thereby because a part of it is used as a shop."

[LORD GODDARD C.J. These cases may have to be considered by the House of Lords. They seem to be in an awful tangle.]

On the authorities, once one appreciates what the unit is, the position is clear. [Counsel referred to *Wolfe* v. *Hogan*.[12]]

[LORD GODDARD C.J. Could a person be restrained from living on the premises?]

No, one must look at the unit as a whole, but the fact that he can lawfully live in part of it does not change the unit from business premises to a dwelling-house, for example, a caretaker in a block of offices. One room at the top of a block of offices could not be brought within the Rent Acts. In the present case the fact that there was living accommodation does not matter. The question is, was it a shop with living accommodation over it or was it a house with a shop underneath?

In *Hicks* v. *Snook*[13] there was no covenant as to user and it was found as a fact that it was used as business premises. In *Whiteley* v. *Wilson*[14] the court was dealing with composite user. One has to look at the lease and if the answer is found there it is conclusive. Otherwise the question must be determined whether the premises are a shop with a flat over them or are a dwelling-house. [Counsel referred to *Reg.* v. *Folkestone and Area Rent Tribunal, ex parte Webb*.[15]]

Stogden, in reply, referred to *Epsom Grandstand Association Ld.* v. *Clarke*.[16]

Cur. adv. vult.

Jan. 29. LORD GODDARD C.J. read the following judgment of the court, in which he stated the facts and continued: If the premises let fall to be considered as a dwelling-house within the meaning of the Act of 1949, they were the proper object of an application to the tribunal and the tribunal would be bound to fix a reasonable standard rent for them. If, on the other hand, the premises do not constitute such a dwelling-house as the landlords maintain, and as the tribunal have found, then the tribunal acted rightly in refusing jurisdiction.

---

[10] [1944] K.B. 679.

[11] [1953] 1 Q.B. 77, 85.

[12] [1949] 2 K.B. 194.

[13] 27 L.G.R. 175.

[14] [1953] 1 Q.B. 77.

[15] Post, p. 454.

[16] (1919) 35 T.L.R. 525.

A dwelling-house within the meaning of the Act of 1949, which is to be read with the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, is any house or part of a house let as a separate dwelling (subject to the rateable value not exceeding certain limits), and by section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, it is provided that: "Subject to "the provisions of paragraph (*a*) of the last preceding subsection," which is immaterial for this purpose, "the application "of the principal Acts, by virtue of this section, to any dwelling-"house shall not be excluded by reason only that part of the "premises is used as a shop or office or for business, trade or "professional purposes; . . ."

The passage set out above is that applicable where what is being considered is a single, though composite, structure. Whether or not a single structure used partly as a dwelling-house and partly for business purposes is a dwelling-house within the Acts has been the subject of a great number of decisions of the Court of Appeal beginning with *Epsom Grand Stand Association* v. *Clarke*,[1] and, after that decision became incorporated in the Act of 1920, including *Hicks* v. *Snook*,[2] and ending with *Whiteley* v. *Wilson*.[3] For reasons which will appear hereafter in this judgment we do not feel that it is now necessary to go in detail through the various decisions.

The argument advanced by the landlords in this case is based on the presence of a covenant which appears in clause 2 (11) of the lease. It reads as follows: "The lessee will not use the "demised premises or any part thereof save as a shop only nor "permit the demised premises or any part thereof to be used "otherwise than for the business of a fruiterer greengrocer and "florist . . ." Reliance is also placed on clause 2 (19), "The "lessee will not keep the demised premises closed for a longer "period than fourteen days at any one time during any one "year of the term without first obtaining the consent of the "lessor thereto in writing."

---

[1] (1919) 35 T.L.R. 525.

[2] (1928) 93 J.P. 55.

[3] [1953] 1 Q.B. 77; [1952] 2 T.L.R. 802.

The principle, as we understand it, is this. If the covenant debars the use of the whole of the premises for the purposes of a dwelling-house so that the tenant can be restrained from such user, that is conclusive against the premises being a dwelling-house apart from any assent to change of user.

It appears to us that, apart from the covenant in clause 2 (11) of the lease to which we have already referred, the facts here are really indistinguishable from those in *Reg.* v. *Folkestone and Area Rent Tribunal, ex parte Webb*,[4] which was before this court on May 1, 1953. When that case was decided the judgment in *Whiteley* v. *Wilson* [5] had been delivered though not then reported, but we were given a transcript of the judgments and relied upon them. *Webb's* case [6] was a case where the premises were a shop with living rooms over, and there is no substantial difference between the premises in that case and those in the present. In that case, we held that the facts gave the tribunal jurisdiction. We decided that it was immaterial to inquire into questions relating to dominant user, but that if the tenant was making the structure, to use a neutral expression, his dwelling and was doing nothing improper in so doing that was enough. No appeal was brought against our judgment and it binds this court unless the covenant which we have mentioned distinguishes it. In *Webb's* case [6] there was a covenant not to carry on any business but that of a tobacconist, while here the covenant is no doubt wider as it provides that the premises are not to be used save as a shop for a greengrocer's business. In *Whiteley* v. *Wilson* [7] on which, as we have said, this court relied, it is true that Romer L.J. did, in his judgment, except the case where a purpose is specified in the agreement, and here it is said that the effect of the covenant is to except, that is, to prohibit, the premises from being used as a dwelling. The rule with regard to the construction of such a covenant is conveniently stated in Foa's Landlord and Tenant, 7th ed., p. 111, and as we think that the passage accurately states the law we will quote it instead of setting out the various cases which deal with this point: "A covenant, like any other contract, is to be con-"strued according to the intent of the parties as expressed by "their own words, and by regard to the whole of the instrument, "and the surrounding circumstances of the case, it being also "a rule that if the words be doubtful, that construction is to be "taken which is most strong against the covenantor." Bearing that in mind, it is in our opinion impossible to construe this covenant so as to prohibit the tenant from living on the premises.

---

[4] Post, p. 454.

[5] [1953] 1 Q.B. 77.

[6] Post, p. 454.

[7] [1953] 1 Q.B. 77.

Provided that the tenant carries on a greengrocer's business it would in our opinion be impossible, and, indeed, absurd to say that he was in breach of his covenant because he lived on the premises. So to hold would mean that the whole of the upper part was sterilized, at least to the extent that the rooms could only be used as a store or for some such purpose, and not for that for which they were designed which the tenant is under covenant to preserve and not to alter. To show the absurdity of such a construction, we need only point to the covenant to repair, which provides that the tenant is, among other things, to grain, varnish, whitewash and colour such parts as are usually so treated and to paper with paper of suitable quality such parts as are usually papered. One does not paper greengrocer's shops. The premises are obviously let both for residential and shop purposes, but a shop is to be maintained there because they are in a shopping street and if they were not used as such their value would or might be impaired. No shopkeeper would be likely to pay £350 a year for these premises, nor would a lessor expect to get that rent if everything but the ground floor was to be sterilized in the sense that the upper part was not to be used for the purpose for which it was designed. Even if the contract was worded so strongly that the court was constrained to construe it as prohibiting the tenant from living on the premises, it seems to us probable that the landlords here could not insist on that construction. The uncontradicted evidence is that the upper part has always been used as a residence, and this must have been known to both the original lessor and to the present landlords who bought his reversion. But as this point was not fully argued before us we will say no more about it, though it will be open to the tenant if this case goes higher.

Cases in which the demise was of a barn or a warehouse, but in which the lessee squatted, to use a convenient expression, or lived as a caretaker, are not in pari materia with the present. To use a convenient phrase borrowed from the judgment of Moore L.J. in *Burns* v. *Radcliffe*,[8] "the nature of the business "is not incompatible with the residence of the tenant and I can "see no reason for holding that the whole premises were not his "dwelling-house." This conclusion is, we think, in accordance with the decision of the Court of Appeal in *Hicks* v. *Snook*.[9]

---

[8] [1923] 2 I.R. 158, 162.

[9] 93 J.P. 55.

1954

REGINA v. BRIGHTON AND AREA RENT TRIBUNAL. *Ex parte* SLAUGHTER.

Accordingly, we do not find it necessary to go through the numerous cases which have been cited to us because each must depend upon its particular facts. The principle which we would endeavour to state is that, be the premises what they may, if it appears that they were let to a tenant for the purpose of his living in them as his house, provided he is not a service tenant, then they come within the Acts, subject of course to their rental or rateable value. No doubt a difficult problem here confronts the tribunal, for the Acts do not direct that a one separate rent is to be found for the business and another for the residential part. This, however, does not directly arise in the present motion. In our opinion the tribunal here had jurisdiction and an order of mandamus should issue.

Application granted.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co., for Bosley & Co., Brighton; Charlton, Hubbard & Co., for Marsh & Ferriman, Worthing; Solicitor, Ministry of Health.*

J. D. P.

NOTE.

1953 *May* 1.

Lord Goddard C.J., Lynskey and Parker JJ.

REGINA *v.* FOLKESTONE RENT TRIBUNAL. *Ex parte* WEBB.

MOTION for an order of mandamus.

The applicant, Wallace Horatio Webb, moved for an order directed to the Folkestone Rent Tribunal (now the Kent Rent Tribunal) to hear and determine an application to fix the rent of premises described as "all that shop with the dwelling rooms above situate and known as "No. 72, High Street, Folkestone." The tribunal had dismissed the application on the ground that they had no jurisdiction.

The premises consisted of a shop on the ground floor with dwelling rooms occupying the two upper floors. The residential part consisted, on the first floor, of a kitchen and living room together with a water closet, and, on the second floor, of two bedrooms. There was a separate entrance to the residential part by means of a door at the end of a passage giving access to the street. Gas, electricity and water services were supplied to the premises. There were no such services provided separately and independently for the shop. There was a covenant in the lease that the only business that might be carried on by the tenant was that of a tobacconist.

L. A. Blundell for the applicant.
H. E. L. McCreery for the landlord.
J. P. Ashworth for the tribunal.

LORD GODDARD C.J. The case raises the familiar question whether premises are business premises or whether they are a dwelling-house. It is a question whether or not section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, applies. Section 3 (3) provides: "Subject to the provisions of paragraph (*a*) of the last preceding subsection, "the application of the principal Acts, by virtue of this section, to any "dwelling-house shall not be excluded by reason only that part of the "premises is used as a shop or office or for business, trade or professional "purposes; and for the purposes of the Rent and Mortgage Interest "Restrictions Acts, 1920 to 1938, as amended by virtue of this section, "any land or premises let together with a dwelling-house shall, unless "the land or premises so let consists or consist of agricultural land "exceeding two acres in extent, be treated as part of the dwelling-house; "but, save as aforesaid, the principal Acts shall not, by virtue of this "section, apply to any dwelling-house let together with land other than "the site of the dwelling-house."

[His Lordship stated the facts and continued:] It is impossible, I should have thought, to suppose that the living part of these premises could be described as anything else than a dwelling-house. There is a separate entrance, a kitchen, a sitting-room, bedrooms, sanitary arrangements and everything of that nature which one would expect to find. But the chairman of the tribunal, giving the decision of the tribunal, said: "My colleagues and I feel that when the tenant took these "premises and was a willing payer of £300 a year, he took them as "business premises, and, moreover, he understood that these business "premises were to carry out a certain business throughout the period "of his tenancy, and therefore in the light of the terms of the Rent "Acts and case law which has been expounded, they have decided not "to accept jurisdiction in this matter."

It is only fair to the tribunal to say that at the time when they gave that decision *Whiteley* v. *Wilson* [1] had not been heard. I think that, if they had had the advantage of reading that case, they would have probably come to a different decision. Evershed M.R. gave a judgment showing that if the premises are in one block or are all one structure, and the substantial part of that structure is used as a dwelling-house, the Rent Acts will apply, though no doubt if the circumstances are that there is a block of offices in which one corner is occupied by a caretaker, it may be that the Acts do not apply. But it is no longer enough to apply the dominant user test. Romer L.J. said [2]: "I agree, and I "certainly find myself in agreement with the judge that no question of "dominant purpose really arises in the present case. I think that the "question in such cases as this, where the subject-matter of the tenancy "is one building used partly as a dwelling-house and partly as a shop, "and no purpose is specified in the tenancy agreement, is whether the "building should in a broad sense be regarded on the one hand as a "dwelling-house which is partly or even substantially used as a shop, or, "on the other hand, as a shop which is used in part for residential purposes. If the former, then the building is within the Rent Restrictions

---

[1] [1953] 1 Q.B. 77; [1952] 2 T.L.R. 802.

[2] [1953] 1 Q.B. 77, 84.

"Acts, by reason of the first part of section 3 (3) of the Act of 1939, "and will not be taken out of it because of the general provision at "the end of the subsection. If, on the other hand, the common sense "of the matter is that the building is a shop, then it is outside the first "part of the subsection and will not be brought within the Act by virtue "of the second part. In my opinion it is only in cases in which the "first part of the subsection is inapplicable that the effect of the second "and third parts need be considered, and these apply, as I think, "mainly, if not wholly, to land or other premises let together with a "dwelling-house and not forming a part of its structure."

In the present case, although there is a covenant in the lease that the only business which may be carried on is that of a tobacconist, it is clear that these premises were let partly as a dwelling-house and partly as a shop. For these reasons, if the tribunal had properly directed themselves, they would have held that this was a dwelling-house and, as they did not, the order must go.

LYNSKEY J. I agree.

PARKER J. I agree.

Order for mandamus.

Solicitors: *Bartlett & Gregory for A. D. & L. J. B. Brockman, Folkestone; Haslewood, Hare, Shirley Woolmer & Co. for Rootes & Alliott, Folkestone; Solicitor, Ministry of Health.*

J. D. P.

1954
Jan. 26, 29.

Lord Goddard C.J., Byrne and Parker JJ.

REGINA *v.* YORK, HARROGATE, RIPON AND NORTHALLERTON AREAS RENT TRIBUNAL. *Ex parte* INGLE.

Landlord and Tenant—Rent tribunal—Furnished premises—Business premises—Boarding-house—Tenant residing in basement—Jurisdiction of rent tribunal to fix rent—Application of Rent Restriction Acts definition of "dwelling-house"—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2 (1).

Where furnished premises are let as a boarding-house, in part of which the tenant resides, while carrying on the business of a boarding-house in the remainder, the whole of the premises come within the provisions of the Furnished Houses (Rent Control) Act, 1946, and a rent tribunal has jurisdiction to hear and determine a reference made by the tenant to fix a rent for the premises under the Act.

Principles in *Reg.* v. *Brighton and Area Rent Tribunal, ex parte Slaughter,* ante, p. 446, applied.

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

1954

REGINA
v.
YORK, ETC.,
RENT
TRIBUNAL.
Ex parte
INGLE.

MOTION for an order of mandamus.

By an agreement in writing dated March 1, 1953, the landlord let to Mrs. Gladys Betty Ingle the premises described as "the "boarding-house situated at 19, New Queen Street, Scarborough, "Yorks, with the fixtures, fittings and furnishings as per inventory" at a rent of £327 12s. per annum. The premises were substantially furnished. There was no covenant as to user, and thereafter the tenant and her family occupied the basement and one bedroom on the ground floor as their home, and ran the rest of the premises as a boarding-house. On September 2, 1953, the tenant applied to the York, Harrogate, Ripon and Northallerton Areas Rent Tribunal to fix a rent for the premises pursuant to their powers under the Furnished Houses (Rent Control) Act, 1946. The reference came on for hearing on October 16, 1953, when the landlord objected that the tribunal had no jurisdiction to entertain the reference as the premises had been let as business premises and not as a residence. The tribunal acceded to that contention and accordingly declined jurisdiction.

The tenant applied for an order of mandamus directed to the tribunal to hear and determine the reference.

M. D. Van Oss for the applicant. The test to be applied in determining whether the premises come within the provisions of the Furnished Houses (Rent Control) Act, 1946, is whether there is "the right to occupy [the premises] as a residence," as provided in section 2 (1). It is immaterial that it may be suggested that the Act was never intended to apply to the present class of case, for the matter is concluded by the words of the Act, and if there is a right to occupy the premises in question as a residence they are within the Act.

[PARKER J. It really amounts to a distinction between occupying the premises as a "dwelling-house" as in the other Rent Acts, or as a "residence" in this Act.]

Yes, except that "residence" is wider, and all that one has to show is a right to reside there. *Kitchen's Trustee* v. *Madders*,[1] in which Asquith L.J. referred to *Burns* v. *Radcliffe*,[2] is conclusive on that point.

J. D. F. Moylan for the landlord. The proper way to construe section 2 (1) of the Act of 1946 is to look at it broadly and inquire whether the premises were let as a residence or whether the broad right granted was to occupy the premises for the purpose of

---

[1] [1950] Ch. 134, 148; [1949] 2 All E.R. 1079.

[2] [1923] 2 I.R. 158.

1954

REGINA
v.
YORK, ETC.,
RENT
TRIBUNAL.
Ex parte
INGLE.

running a boarding-house. "Residence" should be construed as being mainly, predominantly or substantially a residence. Here the premises were let for use as a boarding-house. Cases such as *Kitchen's Trustee* v. *Madders* [3] and *Vickery* v. *Martin* [4] do not apply to the present case because they all rest fundamentally on the proposition that the Acts there in question expressly provide that premises do not cease to be within the Acts by reason of the fact that they are in part used for business purposes.

[LORD GODDARD C.J. In *Epsom Grand Stand Association Ld.* v. *Clarke* [5] it was held that premises were let as a dwelling-house although they were used as a public-house, and the effect of that decision was subsequently adopted in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920.]

Under the Rent Acts the court has to ask two questions. First, for what purpose were the premises let; and secondly, having ascertained that purpose, the court has then to determine whether that purpose was for a dwelling-house. Even under the Rent Acts the court looks at the matter in a broad way. In the present case the court has to inquire whether the main or substantial object was the letting of a "residence" or of a boarding-house; if it was the latter, as is submitted, then the premises do not come within the statute. If the principle that the premises are not excluded from the provisions of the Act by reason of the fact that the major part of the premises is used for business purposes is inapplicable, then one is free to look at the lease itself and ask whether it is the grant of a residence or the grant of a boarding-house.

[LORD GODDARD C.J. The authorities show that the question of dominant user does not arise under the Rent Acts, and the court simply has to consider whether the premises are used as a dwelling-house.]

[Reference was made to *Rex* v. *Epsom and Ewell Rent Tribunal, ex parte Tucker*.[6]]

J. H. L. Royle, for the tribunal, was not called upon.

Van Oss replied.

Cur. adv. vult.

January 29. PARKER J., reading the judgment of the court, stated the facts and continued: In the judgment delivered earlier today in *Reg.* v. *Brighton and Area Rent Tribunal,*

---

[3] [1950] Ch. 134.

[4] [1944] K.B. 679; 60 T.L.R. 513; [1944] 2 All E.R. 167.

[5] (1919) 35 T.L.R. 525.

[6] (1947) 111 J.P.N. 487.

1954

REGINA
v.
YORK, ETC.,
RENT
TRIBUNAL.
Ex parte
INGLE.

ex parte Slaughter,[1] the court has set out the principles which in their view should be applied in determining whether particular premises, intended to be used partly as business premises and partly as a dwelling-house, constitute a dwelling-house for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, and the Landlord and Tenant (Rent Control) Act, 1949. If those principles are applicable to determine whether furnished premises are within the Furnished Houses (Rent Control) Act, 1946, it is clear that the premises in this case are within the Act. It is contended, however, on the part of the landlord that these principles are inapplicable since whereas the Rent and Mortgage Interest Restrictions Acts apply to " a house or a part of a house let as a separate dwelling," the Act here in question applies to a house or part of a house in respect of which the right to occupy as a residence has been granted. In our opinion, however, this difference in wording does not prevent the application of these principles. If anything, the wording in the Act here in question admits more easily of their application since the Act is expressly applied to contracts under which the lessee is within his rights in occupying the premises as a residence.

Nor does it, in our view, make any difference that under the Rent and Mortgage Interest Restrictions Acts there is an express provision that any dwelling-house shall not be excluded by reason only that part of the premises is used for business purposes. The principles to which we have referred were adopted by the Court of Appeal in *Epsom Grand Stand Association Ld.* v. *Clarke*,[2] before there was any such statutory provision. Indeed, the Act of 1920 only gave statutory recognition to that decision. In our view, therefore, the tribunal here had jurisdiction, and an order of mandamus should issue.

Order of mandamus.

Solicitors: *Jaques & Co. for Whitfield, Bell & Smith, Scarborough; Williamson, Hill & Co. for Moody & Co., Scarborough; Solicitor, Ministry of Health.*

C. J. E.

---

[1] Ante, p. 446.

[2] (1919) 35 T.L.R. 525.

C. A.

MASON AND ANOTHER *v.* CLARKE.

1953
Nov. 18, 19, 20, 23, 24, 25; *Dec.* 8.

Somervell, Denning and Romer L.JJ.

Landlord and Tenant—Profit à prendre—Game—"Reservation" of game, rabbits, etc.—"Re-grant" by tenant—Extermination of rabbits by gas—Reasonable operation in interests of farming—Snares set by grantee—Unreasonable—Oral letting of rabbiting rights—Tainted with illegality—No equitable right to profit à prendre—Ground Game Act, 1880 (43 *&* 44 *Vict. c.* 47), *s.* 1 (1) (*b*)*—Agriculture Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *s.* 98*—Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 65 (1).

Agriculture. Equity—Clean hands—Equitable right—Evidenced by false receipt—Dishonest motive—Unenforceability. Specific Performance.

By an agreement by which the second plaintiff, a company, let certain farm land to the defendant, a farmer, the company reserved to itself "(subject to the provisions of the Ground Game Act, 1880) "all the game, rabbits, wild fowl and fish with liberty for itself "and all other persons authorized by it, to preserve, hunt, course, "kill and carry away the same," and the defendant agreed "(subject to the Ground Game Act) not to shoot or otherwise sport "on the land." The company orally leased the rabbiting rights over the land to the first plaintiff, who laid snares on land where the defendant's sheep grazed. The defendant entered into an agreement with the Agricultural Executive Committee for the latter to gas rabbits in the defendant's hedgerows in order to keep them down, and the committee did so. The plaintiffs claimed that that and certain other acts of alleged interference by the defendant were a breach of his covenant and constituted a trespass against their enjoyment of the profit à prendre:—

Held, that the "reservation" of all game, rabbits, etc., by the company operated as a re-grant by the defendant to the company (*Wickham* v. *Hawker* (1840) 7 M. & W. 63), and, so regarded, the defendant's obligations were "not to shoot or otherwise sport "on the land," and not to derogate from his grant. While the obligation "not to derogate" meant that he must not wilfully destroy the game or rabbits, he was not precluded from carrying out reasonable operations advisable in the interests of good farming (*Peech* v. *Best* [1931] 1 K.B. 1, 18; 46 T.L.R. 467), and in agreeing to permit the Agricultural Executive Committee to gas the rabbits he was only doing what in the circumstances was reasonable and advisable, and in so doing he did not derogate from his grant. Both the first plaintiff and the defendant had to "use the land reasonably "having regard to the interest of the other" (*Peech* v. *Best*) and it was not reasonable, except by agreement, to lay snares on land where the defendant's sheep were grazing, and he had a right to kick them over so as to save his sheep from danger.

Further, if it were necessary for the defendant to justify his action by reference to the Ground Game Act, 1880, the gassing

---

[Reported by OLIVER J. SHAW, Esq., Barrister-at-Law.]

was authorized by section 1 (1) (*b*) of that Act. The word "employed" in that subsection included any employment, direct or indirect.

The parol agreement between the two plaintiffs for the lease of the rabbiting rights was evidenced by a receipt which stated that the consideration paid by the first to the second plaintiff was a "contribution towards bailiff's wages." The defendant alleged that that receipt was issued in furtherance of an illegal purpose, to defraud, it was suggested, the Inland Revenue, and that as such it could not be relied upon to support the plaintiffs' claims:—

Held, that the first plaintiff's rabbiting rights having been granted orally, and not by deed, he had no right at law to a profit à prendre; and that the statement in the receipt which he accepted, that the consideration was a contribution "towards bailiff's "wages" was false, and the inference was that it was done with some dishonest motive, and accordingly he had no right in equity to a profit à prendre and was not lawfully authorized to go rabbiting on the land; and, accordingly, neither the company nor the first plaintiff had any cause of action against the defendant in any event.

Decision of Croom-Johnson J. reversed.

Appeal from Croom-Johnson J.

In December, 1949, the second plaintiffs, Shepton Mallet Transport Co. Ld., bought an estate in Leicestershire and Northamptonshire known as the Hothorpe Estate. The fields had been let for some years to the defendant, one Clarke, a farmer (and his predecessors in title), the spinneys having been retained by the landlords in their own occupation and also the shooting rights over the fields let to the defendant. The defendant used the fields for grazing sheep. The tenancy was originally under an agreement made in 1926 when the owner of the land was one de Trafford, and when the second plaintiffs acquired the land the tenancy was continued on the same terms as before.

After the company took over the land, rabbits, which had their holes in the hedgerows, became such a serious nuisance that in October, 1950, the Agricultural Executive Committee decided to put into force their powers under section 98 of the Agriculture Act, 1947, to exterminate the rabbits. The defendant entered into an agreement with the committee for the rabbits in his hedgerows to be gassed there, and that was done on October 24, 1950.

On or about October 11, 1950, Mason, the first plaintiff, had by oral agreement acquired the rabbiting rights over the land from the company for one year for £100, which sum was later described in a receipt given by the company's agents to Mason, as a "contribution towards bailiffs' wages on Hothorpe

"Estate." Later, on December 31, 1950, Mason's rabbiting rights were confirmed by a deed.

The action arose out of four incidents. First, on October 15, 1950, the defendant ordered Mason off the fields, but he did not go and continued to snare rabbits. Secondly, on December 2, 1950, the defendant kicked over some of the snares which Mason had laid in the fields. Thirdly, on October 22, 1950, a man with two companions went ferreting in the hedgerows with the defendant's consent; and fourthly, the Agricultural Executive Committee, by agreement with the defendant, gassed the rabbit holes in the hedgerows on October 24, 1950.

By their action, arising out of the above four matters, the plaintiffs claimed that the defendant had wrongfully broken his covenant not to shoot or otherwise sport on the land and had trespassed upon and interfered with their rights by himself shooting and killing rabbits and by procuring the Agricultural Executive Committee to kill rabbits by gassing them. They also alleged that the defendant had prevented them from enjoying the benefit of their profit à prendre.

The defendant alleged that the real purpose of the receipt given to Mason by the company's agents was an illegal one, namely, to defraud the Inland Revenue, and that as a result Mason was precluded from relying on such receipt to evidence his equitable right to enter upon the land and enjoy the rabbiting rights before December 31, 1950, when he acquired a legal title by deed.

He also alleged that the reservation of the profit à prendre did not entitle the plaintiffs to kill and take away rabbits for commercial gain, nor to lay snares in the defendant's open fields.

Croom-Johnson J. found for the plaintiffs and awarded punitive damages against the defendant in favour of both plaintiffs on the ground that his raising the matter of fraud in his defence was in the circumstances unjustified.

The defendant appealed and there were cross-appeals by both plaintiffs.

John Perrett for the defendant. Despite section 65 (1) of the Law of Property Act, 1925, which abolished the necessity for the tenant to execute the lease himself when rights are reserved to the landlord, such rights nevertheless arise by way of re-grant: *Wickham* v. *Hawker*.[1] The defendant has not broken his covenant not to shoot or otherwise sport on the land. Gassing is not shooting or sporting, and it was done with proper regard to the provisions of the Ground Game Act, 1880, and in the face of the Minister's threat to put into force his compulsory powers under section 98 of the Agriculture Act, 1947. The Minister of Agriculture or, alternatively, the officer who actually carried out the gassing, was duly authorized in writing and he was assisted by the defendant's son. To keep down pests such as rabbits is in accordance with the statutory requirements of good husbandry: see section 11 (2) (*d*) of the Agriculture Act, 1947, and *Peech* v. *Best*.[2] The defendant could not have committed a trespass against the first plaintiff's profit à prendre because at no material time did that plaintiff possess a grant by deed or an enforceable right to call for a deed.

---

[1] (1840) 7 M. & W. 63.

The first plaintiff had no possessory right whatever at the time of the incidents complained of. A possessory title cannot be acquired against a lawful occupant. The defendant had, as a necessary incident of his letting, exclusive possession of the land. In all the authorities cited upon this point by the plaintiffs (*Nicholls* v. *Ely Beet Sugar Factory*[3]; *Fitzgerald* v. *Firbank*[4]; *Bristow* v. *Cormican*[5]), the person whose right was infringed claimed to be in exclusive possession of either the land or the right issuing out of that land. Here the first plaintiff could in any event have had only an equitable right under the parol agreement with the second plaintiff, but as this would arise from a receipt which was false on the face of it and concerned a payment of rent, i.e., taxable income, the receipt tainted the whole transaction with illegality and conferred no right in equity on the first plaintiff, who was therefore a trespasser, and the second plaintiffs are therefore precluded from setting up the transaction against the defendant: *Alexander* v. *Rayson*.[6] Even if the first plaintiff had a right to hunt, course, kill and carry away rabbits, the laying of snares or, alternatively, their laying without prior notice to the defendant, in the defendant's open fields where his sheep were grazing, was an unreasonable and wrongful user of that right. In these circumstances the defendant was entitled to order the first plaintiff off the land and to kick over his snares. He was also entitled to keep down the rabbits himself by shooting or procuring the gassing of them.

It is not sufficient for the first plaintiff, not being the true owner of the profit à prendre, to prove possession unless he himself can justify his entry on the land by a title derived from the true owner. The first plaintiff had had no such title and was at all material times a trespasser. The trial judge was wrong in awarding punitive damages because the defendant had raised a plea of illegality by way of defence to the claim. No such course of action is known to the law.

---

[2] [1931] 1 K.B. 1; 46 T.L.R. 467.

[3] [1931] 2 Ch. 84.

[4] [1897] 2 Ch. 96.

[5] (1878) 3 App.Cas. 641.

[6] [1936] 1 K.B. 169; 52 T.L.R. 131.

The trial judge made no specific findings in relation to the plaintiff's allegation of unauthorized killing of rabbits on October 22, 1950, and the gassing of the rabbits by the Agricultural Executive Committee on October 24, 1950.

[SOMERVELL L.J. Then it is open to this court to look at the evidence upon those matters and make its own findings.]

John Hobson for the plaintiffs. On the true construction of the reservations and covenant in the agreement the second plaintiff company and any person authorized by it were entitled to kill and carry away all the rabbits on the demised land by shooting, snaring or any other lawful means. The defendant had no right under the covenant to kill, or to authorize any other person to kill, rabbits except in accordance with the Ground Game Act, 1880. It is admitted that section 1 of that Act confers on every occupier of land the right to kill and take ground game, namely, hares and rabbits thereon concurrently with any other person who may be entitled to do so. It is provided, however, that the occupier's right under that section is subject to the following limitations: He shall kill and take ground game only by himself and by persons duly authorized by him in writing; and (a) the occupier himself and one other person authorized in writing by such occupier shall be the only persons entitled under this Act to kill ground game with firearms; and (b) no person shall be authorized by the occupier to kill or take ground game except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person bona fide employed by him for reward in the taking and destruction of ground game. On October 22 more than one man authorized in writing and bona fide employed for reward were ferreting—there were three men ferreting. Assistants cannot be employed to kill and take ground game: *Richardson* v. *Maitland*.[7]

On October 24, 1950, when the servant of the Agricultural Committee gassed rabbits assisted by the defendant's son, the authority already given to the person previously authorized had not been withdrawn, and the servant of the committee who did the gassing, and who is still unknown to the plaintiffs, had not been authorized in writing. The defendant had only signed a written contract in general terms with the committee.

---

[7] (1897) 34 Sc.L.R. 426.

As to the alleged illegality of the oral agreement between the first and second plaintiffs whereby the former was given a lease of the rabbiting rights, the plaintiffs deny any intended fraud or other illegal purpose in drafting the receipt in the form in which it was made out, and the trial judge expressly said that no fraud had been proved. The £100 paid by the first plaintiff to the second plaintiff in respect of which the receipt was given was correctly recorded in the books of the second plaintiff and no fraud was ever intended or carried out. The actions of the defendant in abusively ordering the first plaintiff off the land, kicking over his snares, authorizing three other men to kill rabbits, and procuring the Agricultural Executive Committee to gas rabbits, constituted a trespass against the rights of the first plaintiff and were also a breach both of the reservation in the lease and of the defendant's covenant not to shoot or otherwise sport on the land. [*Nicholls* v. *Ely Beet Sugar Factory*[8] and *Fitzgerald* v. *Firbank*[9] were referred to.]

None of the defendant's acts is justified under section 1 of the Ground Game Act, 1880, or otherwise. The first plaintiff at all material times was in equity entitled as against the second plaintiff to specific performance of the parol agreement for the rabbiting rights: *Walsh* v. *Lonsdale*.[10] The first plaintiff was in possession of a several profit à prendre which he could protect by an action in the nature of trespass and to which he need not show title. [Reference was made to *Bristow* v. *Cormican*.[11]] Punitive damages can always be awarded for an aggravated trespass: *Merest* v. *Harvey*[12]; *Loudon* v. *Ryder*.[13] The defendant could not raise jus tertii. In any event, the first plaintiff had secured his rights by a deed before action and could sue quia timet and could now obtain damages in lieu of the injunction sought. If the first plaintiff had no rights the second plaintiff could succeed upon the covenants in the agreements for the leases.

Even assuming that the second plaintiff had a fraudulent intent, the rights of the first plaintiff were unaffected. The second plaintiff could rely upon the agreements for the leases which were untainted by any illegality. In any event, the trial judge had seen the witnesses and had acquitted both of fraud.

---

[8] [1931] 2 Ch. 84.

[9] [1897] 2 Ch. 96; 13 T.L.R. 390.

[10] (1882) 21 Ch.D. 9.

[11] 3 App.Cas. 641.

[12] (1814) 5 Taunt. 442.

[13] [1953] 2 Q.B. 202; [1953] 2 W.L.R. 537; [1953] 1 All E.R. 741.

[The following cases were also referred to in argument: *Webber* v. *Lee* [14]; *Lowe* v. *Adams* [15]; *Jeffryes* v. *Evans* [16]; *Bowmakers Ld.* v. *Barnet Instruments Ld.*[17]; *Doe* d. *Douglas* v. *Lock* [18]; *Gardiner* v. *Colyer* [19]; *British Actors Film Co.* v. *Glover* [20]; *Cleobury Mortimer Rural District Council* v. *Childe*,[21] and *Seligman* v. *Docker*.[22]]

Cur. adv. vult.

SOMERVELL L.J. I will ask Denning L.J. to deliver the first judgment.

DENNING L.J., after stating the facts and saying that he would consider first the last two of the four causes of dispute, continued: The question is whether the defendant had any right to kill or authorize the killing of rabbits on the land in his occupation. In this respect, the rights of the plaintiff company and the defendant are regulated by a tenancy agreement made in writing (not under seal) many years ago between de Trafford and Clarke. It was originally for one year, but has since been continued from year to year. When de Trafford sold the land to the Shepton Mallet Company, the benefit and burden of the agreement passed to the company: see *Boyer* v. *Warbey*.[1] The agreement was an ordinary letting of pasture land, but the landlord reserved to himself "(subject to "the provisions of the Ground Game Act, 1880) all the game, "rabbits, wild fowl and fish with liberty for himself and all other "persons authorized by him, to preserve, hunt, course, kill and "carry away the same," and the tenant agreed "(subject to the "provisions of the Ground Game Act) not to shoot or otherwise "sport on the land."

Although the landlord purported to "reserve" the game, rabbits, etc., this was not in strictness a reservation. It was long settled at common law that an "exception" is only properly allowed of things in esse, such as trees or minerals; a "reser-"vation" is only properly admitted of services to be rendered by the tenant, such as paying rent or providing a beast (heriot), whereas a right to come and kill and carry away wild animals is only a liberty or licence—a profit à prendre—which can take effect only by grant and not by exception or reservation. Words of reservation of sporting rights operate, therefore, not by way of reservation proper, but by way of re-grant by the tenant: *Wickham* v. *Hawker*.[2] In former times there was a drawback in this view of the matter in that a reservation could not technically operate as a re-grant unless the tenant executed the lease himself. This technical drawback was eliminated by section 65 (1) of the Law of Property Act, 1925. So that a reservation now operates as a re-grant without any execution by the tenant, but that section does not, I think, affect the substance of the obligations. In point of law the reservation still operates as a re-grant by the tenant to the landlord and the rights of the parties must be ascertained on that footing.

---

[14] (1882) 9 Q.B.D. 315.

[15] [1901] 2 Ch. 598, 600; 17 T.L.R. 763.

[16] (1865) 19 C.B.N.S. 246.

[17] [1945] K.B. 65; 61 T.L.R. 62; [1944] 2 All E.R. 579.

[18] (1835) 2 Ad. & E. 705, 743.

[19] (1864) 10 L.T. 715.

[20] [1918] 1 K.B. 299, 307; 34 T.L.R. 162.

[21] [1933] 2 K.B. 368, 380; 49 T.L.R. 485.

[22] [1949] Ch. 53; [1948] 2 All E.R. 887.

[1] [1953] 1 Q.B. 234; [1953] 1 All E.R. 269.

When this reservation is regarded as a re-grant, it is clear that the obligations of the tenant in regard to it are two only. First, he must obey his express covenant "not to shoot or "otherwise sport on the land" except in accordance with the Ground Game Act, 1880. Second, he must not derogate from his grant. This obligation "not to derogate" means that he must not wilfully destroy the game or the rabbits except in the proper exercise of his rights of cultivation and management of the land. The tenant is not precluded from "carrying out any "reasonable and normal operations which might be deemed "advisable for the purpose of dealing with the land to the best "advantage as farming land": see *per* Greer L.J. in *Peech* v. *Best*.[3] It does not, therefore, prevent him from cutting furze or underwood, or stopping rabbit holes when that is advisable in the interests of good farming, see *per* Scrutton L.J. in *Peech* v. *Best*,[4] but it does, of course, prevent him from netting partridges or dynamiting the fish, or doing wilful destruction of that kind.

Applying this test, it is plain that the company cannot complain of the gassing of the hedgerows on October 24, 1950. Early in October, 1950, the Agricultural Executive Committee had come to the conclusion that the rabbits on the land had become such a pest and were so injurious that they must be exterminated. The committee had tried persuasion, but it was of no avail. So they decided to serve compulsory notices on the owners and on the farmer. The pests officer told the farmer of this decision, whereupon the farmer agreed to let them deal with the rabbits in the hedgerows. The committee sent one man to gas the holes, and he did it with the help of the defendant. It seems plain to me that the defendant did not derogate from his grant in so doing. He was only doing what was advisable, and, indeed, necessary in the interests of good farming. By the same token, the company cannot complain of the ferreting on October 22, 1950. The three men were only killing rabbits in the hedgerows which had become such a pest that they had to be exterminated, and they were, as we know, justifiably gassed two days later.

---

[2] (1840) 7 M. & W. 63.
[3] [1931] 1 K.B. 1, 18.
[4] Ibid. 8, 9.

On this view, it is unnecessary for the defendant to justify himself by reference to the Ground Game Act, 1880, but, if it were necessary, I should have thought that the gassing was authorized by section 1 (1) (*b*) in that it was done by the defendant's son and one man from the Agricultural Executive Committee. The defendant employed the committee in good faith for reward to destroy the rabbits, and they appointed one man to do the actual gassing. If the defendant had employed the man directly, there could have been no doubt that he was justified under the Act. He should not be any the less justified because he employed the man indirectly through the committee. The word "employed" in section 1 (1) (*b*) includes, I think, any employment, direct or indirect. So far as the ferreting is concerned, that also was authorized by section 1 (1) (*b*) of the Act of 1880, because the actual man who was taking the rabbits had himself been duly authorized in writing, and there was no need for his two companions also to be authorized in writing. A written authority is needed by the one who kills and takes the rabbits but not by his assistants. I ought to mention, perhaps, that the man who ferreted did not overlap with the Agricultural Executive Committee because he had finished before they did their gassing, and there would be no point in his ferreting afterwards.

I turn now to the two occasions when the defendant interfered with Mason. The question is what right had Mason to go upon the land? He had no right at law to a profit à prendre. That can only be granted by deed, and there was no deed until December 31, 1950. Before that time Mason had only an oral agreement with the company whereby he paid £100 for the rabbiting on the estate. Did that give him a right in equity? It must be noticed that the oral agreement was not evidenced by writing. All that Mason had was a receipt which said that the £100 was a contribution "towards bailiff's wages on Hothorpe "Estate." That statement was false and no satisfactory explanation has been given of it. The landlord's agent who prepared the receipt said that Bennett, who runs the landlord's company, instructed him to make out the receipt as being "towards bailiff's wages," and he obeyed those instructions. He added significantly that Bennett had a strong personality and expected his instructions to be carried out. But Bennett himself was never called to say why he wanted the receipt made out in that way, and the court has been left completely in the dark about it. In the absence of any explanation of this patently false receipt, I can only infer that it was done with a dishonest motive, for why otherwise should a man make a statement which he must have known was false? It has been suggested that it was done in order to deceive the Revenue authorities, but I do not propose to inquire into the precise motive. Suffice it that it was a false receipt knowingly false, and done with some dishonest motive. Mason took the receipt without making any objection to it. He said that he read it, saw that it was a receipt for his £100, and thought that what Bennett did with the £100 was no concern of his.

What is the effect of this false receipt? It means, I think, that Mason has no right in equity to a profit à prendre. I cannot think that any court of equity would grant him a decree of specific performance when all he could produce was such a strange and suspicious receipt. What, then, was Mason's position? He had no right at law to a profit à prendre because he had no deed. He had no right in equity because he could not get specific performance. Had he any right at all to go on the land? If he was lawfully authorized by the landlord company to go rabbiting on the land, then, of course, he could go, but the difficulty is to see that he was lawfully authorized, when the only thing he could himself produce was this false receipt. I take it to be clear law that a person who comes on to a farmer's land, asserting that he has the authority of the owner so to do, must be prepared to vouch his authority when called upon to do so. In the absence of it, the farmer can turn him off the land as he would any stranger. Mason seems to have realized that the receipt would not be any warrant of authority, because he did not take it with him, not even on October 11, 1950, on the very first occasion when he went to see the defendant, and, what is more, he gave the defendant on that day a wrong account of it. He said that he had paid £100 and had a receipt for it giving him authority to catch rabbits on the estate, whereas the receipt gave him no such authority. It seems to me that Mason cannot be in a better position by not producing the receipt than he would have been by producing it. If he had produced it, it would not have shown him to be lawfully authorized to be on the land, let alone to snare rabbits there. He had, therefore, no lawful authority.

The importance which the defendant attached to the receipt is shown by a letter which, after the first meeting, he wrote to Mr. Smart, the pests officer of the Agricultural Executive Committee: "Today I have seen and spoken to a man who "Bennett has sold the rabbits to for £100. This man holds a "receipt for his payment. He has promised to bring it for my "perusal when I shall make a copy of same and you will be able "to have one also if you wish." Mason, however, never produced the receipt to the defendant. The only person to whom he did produce it was Smart, the pests officer, who went to see Mason on October 13, 1950, and asked to see the receipt. Mason produced it and Smart examined it. There can be little doubt that Smart told the defendant what it contained and thus enabled him to draw it to the notice of the court. It was suggested that Mason need not rely on this false receipt but could derive his authority from a letter written by the landlord's agent to the defendant. I do not think that that is correct. The false receipt taints the whole of his authority, see *Alexander* v. *Rayson*,[5] and makes him a person not lawfully authorized to be on the land.

This means that neither Mason nor the company can complain in respect of the interference by the defendant with Mason. Not Mason, because he had no right to be on the land either at law or in equity. Not the company, because Mason was not a person lawfully authorized by them. It was said that Mason had a possessory title, but I do not agree with this. Not being lawfully authorized, he had no better title than a poacher. Even if I were wrong about this, however, the only thing that Mason can complain of is interference with his snares. The hard words on October 15 broke no bones and gave no cause of action. And in considering whether he had the right to lay snares in the field, the question is whether it was reasonable for him so to do, having regard to the fact that sheep were there. The law is that each

---

[5] [1936] 1 K.B. 169; 52 T.L.R. 131.

"must use the land reasonably having regard to the interest of "the other," see, in *Peech* v. *Best*,[6] *per* Scrutton L.J. It is, I think, not reasonable to lay snares in a field where a man's sheep are grazing, except by arrangement with the farmer beforehand. The reason is because there is a danger of their getting caught in the snares, which may lead to trouble—and, even from the snarer's point of view there is a danger of the snares being knocked over. Mason gave no notice to the defendant of his intention to lay snares, nor of the place where he was going to lay them. This was, I think, unreasonable, and the defendant had a right to kick them over so as to save his sheep from danger.

In my opinion, therefore, neither the plaintiff company nor Mason has any cause of action against the defendant. The judge came to a different conclusion, largely because of the view he took about the receipt. He thought that the defendant should not have taken any point about it, so much so that he seems to have awarded punitive damages against him for raising it. I do not think that he had any jurisdiction to do this.

In my opinion the appeal should be allowed and judgment entered for the defendant on the claim. The defendant did not ask for any order on the counterclaim. The cross-appeals of the plaintiffs should be dismissed.

Romer L.J. I agree. In the absence of some alternative explanation (and none was offered) I cannot avoid the conclusion that the one and only purpose of describing the rent in the receipt as a contribution "towards bailiff's wages" (a statement which was repeated on the stub in the receipt book) was to facilitate a fraud on the Inland Revenue and, if so, the fact that the receipt was never applied to that purpose is nihil ad rem. That such was the object is apparent to anyone with knowledge of the facts who sees it and, as Mason saw it and retained it in his keeping, it must have been apparent to him. How, then, (if at all) does the falsity of the receipt affect Mason's right to sue the defendant in these proceedings for alleged interference with his rights of sporting? In considering this question it is necessary to bear in mind that Mason was not, during the relevant period, the legal tenant of the rights, for they constituted a profit à prendre and were not demised to him by deed. Such rights, then, as he possessed could only take effect and be enforceable in equity. It is said (in reliance on the principle of *Walsh* v. *Lonsdale*[7]) that, as he paid for the rights and the agreement was acted on, equity would recognize them as fully as though they had been validly created at law. It is true that he paid for them and was permitted to enjoy them, but linked with the payment was a dishonest intent by the lessors, the furtherance whereof was promoted by the form of the receipt which Mason was content to accept. How, then, can Mason found a claim to recognition in equity upon such a payment? It is clear to me that no court of conscience would afford him any recognition or relief whatever in relation to a transaction which involved a payment so manifestly tainted. He who comes to equity must come with perfect propriety of conduct or (as has been sometimes said) with clean hands. Had the company repudiated its oral grant of the sporting rights equity would never have granted Mason a decree of specific performance but would have relegated him to such claim as he might possess to damages at law.

---

[6] [1931] 1 K.B. 1, 14.

The position, then, is that at all material times when he was upon the defendant's land in quest of rabbits he had no title to do so at law, nor any right entitling him to be there which would be recognized in equity. The result of this seems plain. The defendant, by the terms of his lease, was only bound to submit to the presence on his land in pursuit of game of the lessors or persons authorized by the lessors, which means lawfully authorized. If, as in my judgment is the case, Mason's authority derived from an agreement which was of no effect either at law or in equity, it cannot be said that his authority was lawful so as to bring him within the category prescribed by the defendant's lease. It follows that Mason was, at all material times, in no better position that a trespasser upon the defendant's land and that his claims in this action accordingly fail.

Assuming, however, that in spite of the false receipt Mason is entitled to have his claims against the defendant entertained by the court, they would, in my opinion, fail on the main issue of interference for another reason. Mason could have no better rights than the lessors themselves were entitled to exercise, and neither he nor they could, in my judgment, kill game on the defendant's land in a way or by methods which were unreasonable in relation to the defendant. The land let to the defendant by the 1926 and subsequent leases was pasture land and was used by the defendant as such. He kept sheep upon the land, and did so for years without trouble. Mason's way of killing the rabbits which ran on the defendant's land from the spinneys was almost entirely by the use of snares. That these devices are potentially harmful or injurious to animals other than rabbits can hardly be denied. Mr. Miles, who is a veterinary surgeon, said in evidence that he had a Labrador dog which had been caught in snares six or seven times in its life. Then, as to sheep, the defendant's daughter Mrs. Garner, who apparently created a favourable impression on the judge as a witness, said that in early December, 1950, she found about 30 of her father's sheep with snares attached to their legs. It is true that neither the Labrador nor these 30 sheep apparently suffered physical injury from being caught in the snares, but not much imagination is required to realize that injury might ensue, and if imagination is not sufficient, proof of the possibility is afforded by the defendant's dead teg to which Mr. Miles was called in January, 1951.

---

[7] (1882) 21 Ch.D. 9.

In these circumstances, it does not appear to me that it is a reasonable exercise of sporting rights to lay down quantities of snares in pasture that is occupied by sheep, except by arrangement with the farmer. It was suggested in argument that, even so, the remedy of the tenant is to seek redress in the courts rather than to remove the snares himself, but I cannot accept this contention. If a man finds something on his land which has no business to be there and which is likely to injure his livestock he needs no order from the courts to obviate the danger. In my opinion, accordingly, Mason has no cause of action against the defendant in respect of the alleged interference with the snares or with Mason's attempts to use them.

It remains to consider the position of the plaintiff company. If I am right in the view that no sporting rights effectively passed to Mason in October, 1950, it follows that those which were reserved to the lessors by the lease of 1926 remained vested in the company and, in relation to their exercise, the illegality of the company's agreement with Mason is irrelevant. It is contended by the company that the defendant invaded their rights in two respects, viz., by ferreting for rabbits on October 22, 1950, and by procuring and instigating the Minister of Agriculture to gas the rabbits in the hedgerows. I am not at all satisfied that the defendant was not acting within his rights under the lease on both of these occasions. The negative covenant imposed on him was " not (subject to the provisions of the Ground Game Act) to

" shoot or otherwise sport on the land." The words " or otherwise sport " appear to me to be referable to the earlier phrase in the reservation, " shoot, hunt, course "; and as neither the ferreting nor the gassing come within that description I do not think that the defendant was, on either occasion, acting in breach of the covenant.

He was, however, " killing " rabbits, and it is not altogether plain to me that he had not the right to do so (apart altogether from the Ground Game Act), though the rabbits when killed would belong to the lessors under the earlier reservation. The lessors reserved the game, etc., to themselves, but only (in terms) a " liberty," and not an exclusive right, to kill them, and " killing " was not mentioned in the negative covenant. I appreciate that the defendant could not (for example) net partridges, but rabbits are a pest, and I am doubtful whether, taking the language as a whole, the defendant was not impliedly authorized to kill them. But be that as it may, it seems to me that the October incident was within the defendant's powers under the Ground Game Act. Geoffrey Mason, who was of the party, had the defendant's written authority to kill the rabbits, which he kept for himself as his " reward." As for the other two men who were with him, they were only assisting him, and I cannot think that a person who is " authorized " for the purposes of the Act is not entitled to bona fide assistance.

As to the gassing, the allegation in the statement of claim is not that the defendant gassed rabbits but, as I have already indicated, that he procured and instigated the Minister to do so. In these circumstances, I doubt really whether the Ground Game Act is relevant, although it was repeatedly referred to by counsel on both sides in connexion with this issue. It does not seem to me that the evidence bears out the complaint as pleaded. Smart said that his committee decided to gas only after it became obvious to them that persuasion (i.e., persuasion directed at the lessors) was of no avail. On October 9, 1950, they authorized Smart to serve notices on both the defendant and Bennett, as representing the lessors. He visited the defendant on October 10, notified him of this, and told him that if he was willing that the committee should deal with the rabbits for him an order would not be necessary. The defendant accordingly signed an agreement then and there for the gassing of the rabbits. No notice, therefore, was served on him, but one was served on Bennett on the 14th. Smart saw Mason on the 13th, and it seems that as a result of the conversation which he then had with him the principle gassing operations on the estate were held over until early in the following year.

The agreement with the defendant, however, was implemented on October 24, and it is of that gassing that the company complains. As, however, the committee had already decided to exterminate the rabbits by gassing before the defendant signed the agreement authorizing them to do so on his land, it cannot be said that he procured and instigated the Minister, as alleged, on the 14th. It is true that on October 11 Smart had sent to the defendant contract forms for his signature and that he returned the covering letter with encouraging remarks on the back, but I cannot see that this suffices to establish the plaintiff's case. And, indeed, an answer by Smart in examination-in-chief shows that the committee's decision to gas was not brought about by the defendant at all. On October 18, 1950, the plaintiff's solicitors wrote to the Northamptonshire Agricultural Executive Committee with reference to the order of the 14th which had been served on Bennett and suggested that it had been inspired by the defendant. That suggestion was put to Mr. Smart when he was in the witness box and he repudiated it. "Of course not," he said. "My committee were only concerned "with the rabbit infestation." In my opinion, accordingly, the company's charge against the defendant of procuration and instigation falls to the ground.

For the above reasons I think that both of the plaintiffs fail in their action and that the appeal should be allowed, except in so far as the defendant asks by his notice of appeal for judgment on his counterclaim (which was not pressed before us). The plaintiffs' cross-appeal should be dismissed.

SOMERVELL L.J. I agree, and I have nothing that I wish to add to the two judgments which have been delivered.

Appeal allowed.

Solicitors: *James & Charles Dodd for Josiah Hincks & Son, Leicester; Wigan & Co. for Phipps & Troup, Northampton.*

C. A.

1953
Dec. 9, 10, 11.
1954
Feb. 12.

Somervell, Denning and Romer L.JJ.

STOCKLOSER *v.* JOHNSON.

[1952 S. No. 2988.]

Vendor and Purchaser — Forfeiture clause — Equitable relief — Sale of plant and machinery—Payment by instalments—Failure to complete payments—Time essence of the contract—Rescission clause—Forfeiture of instalments paid—Purchaser not ready and willing to complete — Whether forfeiture exaction of a penalty — Claim by purchaser to relief.

Contract — Penalty — Forfeiture clause — Penalty or in the nature of penalty—Principle of equity—Whether applicable. Sale of goods. Restitution.

By contracts between the parties a purchaser agreed to purchase from the vendor plant and machinery which were being used in the Washington and Playhatch lime quarries on a royalty basis. The contracts provided that payment of the purchase price should be made by instalments, and that should the purchaser make default in any instalment for a period exceeding 28 days the vendor should be entitled to rescind the contract, forfeit the instalments already paid and retake possession of the plant and machinery. The purchaser having made default in payment of an instalment the vendor rescinded the contract and forfeited the instalments paid. He also acquired the lease of the Washington quarry. The purchaser, who was financially unable or unwilling to complete the contracts, claimed the return of the paid instalments on the grounds that the effect of the forfeiture clause was penal and unconscionable and in equity he was entitled to relief.

The trial judge refused the purchaser relief in respect of the Playhatch instalments, but held that the vendor, by purchasing the lease of the Washington quarry, had put it out of the power of the purchaser to obtain specific performance of the contract and the purchaser was entitled to the return of those instalments, subject to deductions for depreciation of plant and machinery, etc.

The vendor appealed and the purchaser cross-appealed:—

Held, affirming the trial judge as to the Playhatch contract and reversing him as to the Washington contract, that in neither case was the plaintiff entitled to relief.

Per Somervell and Denning L.JJ. The court has jurisdiction to relieve against forfeiture of instalments after rescission if in the actual circumstances of the case it would be unconscionable for the vendor to retain the instalments. On the facts of the present case no claim to relief was made out. Readiness and willingness to produce the balance of the purchase-money is not a condition precedent for relief.

Per Romer L.J. After rescission the court has no jurisdiction to grant relief in the absence of fraud, or sharp practice or other unconscionable conduct. The insistence by a vendor, whose conduct is not open to criticism in other respects, upon his contractual right to retain instalments of purchase-money already paid does not, in itself, constitute unconscionable conduct.

Dicta of Farwell J. in *Mussen* v. *Van Dieman's Land Co.* [1938] Ch. 253 discussed and explained.

Dies v. *British and International Mining and Finance Corporation* [1939] 1 K.B. 724; *Kemble* v. *Farren* (1829) 6 Bing. 141; *Dunlop Pneumatic Tyre Co.* v. *New Garage and Motor Co.* [1915] A.C. 79; 30 T.L.R. 625; *In re Dagenham (Thames) Dock Co.* (1873) L.R. 8 Ch. 1022; *Steedman* v. *Drinkle* [1916] 1 A.C. 275; *Commissioner of Public Works* v. *Hills* [1906] A.C. 368; *Cooden Engineering Co.* v. *Stanford* [1953] 1 Q.B. 56; [1952] 2 All E.R. 915; *Maynard* v. *Moseley* (1676) 3 Swanst. 651; *Kilmer* v. *British Columbia Orchard Lands Ld.* [1913] A.C. 319 also considered.

Decision of Hallett J. in part reversed and in part affirmed.

APPEAL from Hallett J.

The following statement of the facts is taken from the judgment of Somervell L.J.: Prior to 1949 the defendant Johnson leased the Washington lime quarry on the Sussex Downs from one Goring, installed plant and machinery, and himself worked the quarry, using the name " agrilime " in disposing of the chalk. In November, 1949, the defendant ceased to operate the quarry, which was then let by Goring to the Renown Lime Quarries Ld. for 21 years, the lease providing for a minimum rent and royalties. By deed dated March 1, 1950, the defendant let his plant and machinery to " Renown " for so long as that company should be the lessees of the quarry, less the last five months. In consideration " Renown " were to pay royalties, operate the plant, and keep it in good order, fair wear and tear excepted.

In 1943 the " Playhatch," a chalk quarry near Reading, owned by Lord Phillimore, was leased to the defendant for seven years, with an option to renew. The defendant installed plant and machinery, and in 1948 granted a licence to Dow-Mac (Quarries) Ld., who had already been working the quarry, to use his plant and machinery in consideration of the payment of royalties for the period of his lease, which by the exercise of the option had been extended to 1957.

Early in 1950 the plaintiff Stockloser had approached the defendant with a view to taking over the benefit of the Washington hiring agreement and purchasing the machinery, and on April 6, 1950, an agreement was reached for the sale of the plant and machinery with the benefit of the hiring agreement. The purchase price was fixed at £11,000, to be paid in the following instalments: £2,500 on the signing of the agreement, eight half-yearly instalments of £750, and a final payment in June, 1954, of £2,500.

C. A.
1953–54

Stockloser
v.
Johnson.

By clause 5 of the agreement it was provided that if the purchaser made default in an instalment for a period exceeding 28 days the vendor was entitled, on giving 14 days' notice to rescind, "to retake possession of the plant, machinery and appliances "specified in the schedule hereto and again to enter into enjoyment of the said agreement and the fruits thereof as though "this agreement had never been executed. And in such event "all payments made hereunder by the purchaser to the vendor "shall be forfeited to the vendor who shall retain the same."

Clause 6 read as follows: "The purchaser shall be entitled to "the benefit of the said agreement and the plant, machinery and "appliances specified in the schedule hereto as from January 1, "1950, but until the completion of the purchase by the purchaser "and the payment by him of the whole of the instalments hereinbefore stipulated he shall not become the owner of the said "plant, machinery and appliances, neither shall he sell, charge "or otherwise dispose of the same or any part thereof nor of the "benefit of this agreement."

On June 24, 1950, the parties negotiated a similar agreement with regard to the "Playhatch" plant and machinery. The price was stated to be £14,000, but £3,000 of this sum represented an amount that Dow-Mac Co. had paid in advance in respect of royalties, which was to be treated as a deposit. Therefore the actual amount to be paid by the plaintiff was £11,000, payable by a first instalment of £1,250 on December 25, 1950, followed by quarterly instalments of £750, completing the payments on March 25, 1954.

The plaintiff found difficulty from the outset, and owing to bad weather the royalties were less than he had anticipated. The December, 1951, instalments were unpaid, and on February 25, 1952, the defendant gave notices rescinding the agreements. In April, 1952, the defendant acquired the lease of "Washington" from the Renown company.

The plaintiff at no time expressed his readiness or ability to make further payments if the defendant were willing to waive his right to rescind, but he brought the present action claiming the return of the instalments paid under the agreements, which the defendant claimed the right to forfeit. The plaintiff contended that the retention of the instalments amounted to the exaction of a penalty, from which he was entitled to be relieved.

On June 12, 1953, Hallett J. gave judgment refusing the plaintiff relief in respect of the instalment paid under the "Playhatch" agreement, but granting him relief, subject to certain deductions, in respect of the instalments paid under the Washington agreement.

The defendant vendor appealed, and the plaintiff purchaser cross-appealed.

F. W. Beney Q.C. and *Harold Brown* for the defendant. The appeal raises an interesting question whether an important principle of equity in regard to relief from forfeiture is applicable to an agreement for the sale of goods. Under the agreement in question payment for the goods was to be made by instalments, and there was a default clause which provided for rescission at the instance of the vendor in the event of non-payment of an instalment within 28 days after notice of default had been given. The purchaser, who had defaulted, claimed to recover from the defendant the instalments he had paid, without offering to complete the agreement. There have been a number of cases, mostly in the Privy Council, where that problem has been raised in respect of sales of land. Where the purchaser has been in default in regard to the time of payment, and time is of the essence of the contract, so that an order for specific performance will not be made, the court, if the purchaser has shown a readiness and willingness to complete but the vendor holds him to his default, has regarded it as unconscionable to maintain that attitude and retain the instalments. The question here is whether that principle is applicable to sales of goods. Under it unwillingness to complete is fatal to the purchaser's claim. The judge, in dealing with the question of status quo ante, has looked at it arithmetically. In equity relief should be given only if it is unconscionable that relief should be withheld.

[SOMERVELL L.J. If willingness to complete the agreement is a condition precedent to relief, then willingness is neither pleaded nor asserted.]

The defendant relied on Farwell J.'s judgment in *Mussen* v. *Van Dieman's Land Co.*,[1] but the judge did not apply it here in respect of the Washington quarry because he thought that a vendor must hold himself ready to accept an offer to complete the agreement in case such an offer were made and the vendor had, unknown to the plaintiff, rendered it impossible for the plaintiff to come forward and complete. The defendant has done something which the judge has held was a reasonable thing to do; he has shown that the plaintiff was never at any material time ready and willing, or perhaps able, to complete, and certainly has never expressed any readiness. It would therefore be idle for the vendor to stand by and do nothing. Where there is an express provision that time is of the essence of the contract one cannot get specific performance: *Steedman* v. *Drinkle.*[2] In *Kilmer* v. *British Columbia Orchard Lands Ld.*[3] the person making the payments was ready and willing to complete beyond doubt. The above cases and *In re Dagenham (Thames) Dock Co., Ex parte Hulse*[4] were all cases of land, and in every one relief was granted only on full performance of the contract. *Dies* v. *British and International Mining and Finance Corporation*[5] is the only case to be found of sale of goods, and it is distinguishable because there was no provision expressly entitling the vendor to retain instalments.

---

[1] [1938] Ch. 253; 54 T.L.R. 225; [1938] 1 All E.R. 210.

To determine whether a payment is a penalty or an instalment one must look at the contract. Here the money was not paid as a penalty but as an instalment of the purchase price, and it was not until the plaintiff was in default that he was able even to argue that it was a penalty.

The judge was incorrect in thinking that the order which he made restored the status quo ante. He took too narrow a view. If relief is granted it must be granted on equitable terms. The judge has simply considered the financial aspect and not the fact that the defendant might have found another purchaser.

[*Mayson* v. *Clouet,*[6] *Howe* v. *Smith*[7] and *Cooden Engineering Co.* v. *Stanford*[8] were also referred to.]

Neil Lawson for the plaintiff. The argument will be directed to the cross-appeal, and very little will be said on the appeal. It is submitted that the plaintiff is entitled to recover at common law the sums which he paid under both contracts, on the basis of a penal sum as money had and received. Alternatively, he is entitled to relief against forfeiture of the instalments paid, on appropriate terms. It has not ceased to be the plaintiff's money. He still retains an interest in it. To put the plaintiff's case in a different way: if the judge was right in the view which he took of the facts of the case, namely, that the status quo ante was restorable, then it is submitted that there is no ground for distinguishing between the two cases, so as to deprive the plaintiff of relief in one case and not in the other. The judge was wrong in regard to the Playhatch quarry. It may be necessary to defend the judge's decision in regard to Playhatch, but it is submitted that if the plaintiff is entitled to relief in regard to the Washington quarry he is also entitled to relief in regard to Playhatch.

---

[2] [1916] 1 A.C. 275.

[3] [1913] A.C. 319.

[4] (1873) L.R. 8 Ch. 1022.

[5] [1939] 1 K.B. 724.

[6] [1924] A.C. 980; 40 T.L.R. 678.

[7] (1884) 27 Ch.D. 89.

[8] [1953] 1 Q.B. 86.

The defendant's contention that in order to get relief a defaulter has to be ready and willing to complete his bargain must be fallacious. If the contract under which the purchaser is in default has been properly determined by the vendor there is nothing left which the purchaser can be willing and ready to perform. The true basis of *Steedman* v. *Drinkle*[9] and *Kilmer* v. *British Columbia Orchard Lands Ld.*[10] was that although time was of the essence of the contract originally, the time had been extended. In a case like the present, where owing to the purchaser's default the vendor has put an end to the contract, the purchaser knows that he cannot get specific performance and he has to come to the court and ask for relief from forfeiture. If relief in respect of forfeiture of instalments is granted then the defendant is entitled to counterclaim for damages and loss. To adopt the principle of "being ready and willing" when there is no subsisting agreement would really be to impose a fiction on the purchaser. In *Mayson* v. *Clouet*[11] it was held that the rights of the parties depending on the contract, the purchaser, although in default, could recover his instalments since the contract provided only for forfeiture of the deposit. In *Barton* v. *Capewell Continental Patents Co.*[12] it was held that if money paid was a penalty it could be recovered. There was no suggestion of the necessity to be ready and willing to complete. Hallett J. clearly based his decision on *Mussen* v. *Van Dieman's Land Co.*,[13] but that case is not consistent with earlier authorities or with the decision in *Cooden Engineering Co.* v. *Stanford*,[14] and can be distinguished on several specific grounds. Farwell J. in *Mussen's* case[13] was wrong in holding that the clause was not a default clause; he took the view that the plaintiff had no right to recover on the money had and received basis, ignoring the earlier cases and particularly *Public Works Commissioner* v. *Hills*,[15] which must have been based on money had and received; and he adopted the "ready and willing" fallacy. It is submitted that the purchaser is entitled at common law to recover his money no matter how badly he has behaved, and it would be wrong to base the contrary proposition on two cases in which the plaintiff has come forward and asked for relief and specific performance. "Ready and willing" is a conception which has no meaning at all unless applied to an existing contract. The clauses of the contracts in the present case are penal clauses, for under the forfeiture clause the vendor might claim to recover the royalties already received by the purchaser. The plaintiff has a common law right to recover, subject to the defendant's counterclaim for damages.

---

[9] [1916] 1 A.C. 275.

[10] [1913] A.C. 319.

[11] [1924] A.C. 980.

[12] (1893) 68 L.T. 857.

[13] [1938] Ch. 253.

[14] [1953] 1 Q.B. 86.

[15] [1906] A.C. 368.

Beney Q.C. in reply. There is possibly some confusion between the terms "penalty" and "penal nature." Penalty is in the normal way a sum of money which by contract is to be paid by a person who breaks a contract. There is nothing illegal about a penalty clause. It is because it is purely a deterrent to compel performance and it is not really the intention of the contract that it should be a measure of the damages that the courts will not enforce it. In the case of a forfeiture clause the person who has suffered has to come to the court and ask for relief. It is not the other party who asks for enforcement. He has had the money. On the figures here the retention of these sums cannot be described as a penal condition of the contracts. *Barton* v. *Capewell Continental Patents Co.*[16] was tried on its pleadings and the only question for decision was whether a clause was one for a penalty or for liquidated damages. *Public Works Commissioners* v. *Hills*[17] was not a case of retention at all. The *Barton*,[16] *Hills*[17] and *Dunlop*[18] cases were not referred to by counsel in *Mussen* v. *Van Dieman's Land Co.*[19] because they were not relevant to the question which Farwell J. had to decide.

Cur. adv. vult.

February 12. The following judgments were read.

SOMERVELL L.J., having stated the facts as set out above and read the material clauses of the contracts, continued: The first question of construction is whether on the defendant operating clause 5 as it is in the Washington case the plaintiff became liable to account for and pay over the royalties he had received in addition to forfeiting his instalments. If he did, the clause would plainly, I think, be penal in its nature. I am quite clear, however, that it cannot be so construed. Reliance was placed on the words "as though this agreement had never been executed." I am doubtful whether these words add anything, but if it was intended that the vendor should not only keep the instalments, but get back the royalties, it would have had to be expressed in much plainer words.

---

[16] 68 L.T. 857.

[17] [1906] A.C. 368.

[18] [1915] A.C. 79; 30 T.L.R. 625.

[19] [1938] Ch. 253.

The figures for royalties in the years previous to the agreement in the Washington contract were as follows: To January 31, 1948, £3,047 6s. 4d. To January 31, 1949, £2,603 11s. 6d. To January 31, 1950, £2,359 14s. 0d. If one takes a rough figure of £2,500 a year and takes the position at the end of 1951, 1952 and 1953, the comparison between instalments and royalties works out as follows: At the end of 1951 the instalments paid would be £5,500 and the royalties £5,000. At the end of 1952 the instalments paid would be £7,000 and the royalties £7,500. At the end of 1953 the instalments paid would be £8,500 and the royalties £10,000. In fact, of course, the figures were quite different. The bad weather reduced the royalties and the plaintiff was unable to find the money. On the agreement as I have construed it, however, it would seem quite absurd to suggest that this provision was penal in its nature. The position under the Playhatch contract would be more favourable to the defendant. The figures of output were somewhat larger, but the average yearly instalments of the price were something over £3,000 a year. We have not the date when the advance payment for royalties was exhausted.

Many authorities were cited to the judge. It was contended that the penalty law as laid down in *Kemble* v. *Farren*[1] and *Dunlop Pneumatic Tyre Co. Ld.* v. *New Garage and Motor Co. Ld.*[2] had no application to the present claim, and, therefore, the sums were irrecoverable. It was contended, on the other hand, that the clause was penal in its nature and should be disregarded, the plaintiff being entitled to recover the sums subject to a cross-claim for damages or the restoration of the status quo.

The judge reviewed the authorities and decided the case on lines which I will summarize. (1) In the absence of any provision to the contrary a seller who rescinds must repay any part of the purchase price already paid notwithstanding the default of the buyer. (*Dies* v. *British and International Mining and Finance Corporation.*[3]) (2) Here there was a provision to the contrary and it was not unconscionable for the defendant to retain the money. (3) The instalments could not be regarded as deposits. (4) The instalments could not be regarded as a pre-estimate of liquidated damages, but were provisions of a penal nature. (5) There was a distinction between cases in which the court was asked to assist in recovering a penalty and cases such as the present in which the plaintiff sought to recover back sums properly paid as instalments. In the latter case two conditions must be satisfied. First, the effect of the clause must be penal, applying the principles laid down in *Dunlop's* case.[4] Secondly, the court must be satisfied that, in the circumstances of that particular case, that is, looking not merely at the contract, but at the circumstances at the time of the breach, it would be inequitable or unconscionable to allow the recipient to retain the money notwithstanding the power to do so contained in the clause, (6) Although the status quo could be substantially restored by the plaintiff accounting for royalties received as against the instalments, he, the plaintiff, was prima facie precluded from recovering because after the notice he had made no offer and expressed no willingness to complete if the defendant were prepared to waive the breaches on which the notices were served. (7) On the other hand, so far as the Washington case was concerned, the purchase by the defendant of the "Renown's" lease in April precluded him from relying on the plaintiff's unreadiness and unwillingness, because that purchase put it out of the defendant's power to carry out a sale to the plaintiff on the original terms if the plaintiff had agreed to pay the instalment on which he had defaulted and the further instalments.

---

[1] (1829) 6 Bing. 141.

[2] [1915] A.C. 79; 30 T.L.R. 625.

[3] [1939] 1 K.B. 724.

I would have felt a difficulty on any view in drawing that distinction between Playhatch and Washington. I think that in the events which had happened the defendant did not prejudice his position by that purchase. In other words, if the judge was right in his conclusions as to Playhatch, there was no ground on which Washington should be distinguished.

Various arguments were developed before us. I am clear that the plaintiff could only recover if he could satisfy the court that it was unconscionable in the defendant to retain the money. I agree with the judge that he fails to do this and the analysis which I have made of the instalments and the sums which might have been anticipated reinforces the conclusion. Where instalments are to be paid over a period in which the plaintiff has the use or the benefit of the subject-matter the burden of showing unconscionability is not a light one. The judge, I think, proceeded on the basis that it could not be discharged unless the plaintiff was ready and able to complete the purchase, although the defendant having rescinded, no decree for specific performance could be made.

---

[4] [1915] A.C. 79, 85.

I have had the advantage of reading the judgments which will be delivered by my brethren. My brother Romer comes to the conclusion that after rescission by the vendor relief would only be given if there were some special circumstance, such as fraud, sharp practice, or other unconscionable conduct, and that before rescission a buyer would only get relief if willing and able to complete. In other words, the only relief would be further time. I think that the statements of the law in the cases to which I will refer indicate a wider jurisdiction. I think that they indicate that the court would have power to give relief against the enforcement of the forfeiture provisions, although there was no sharp practice by the vendor, and although the purchaser was not able to find the balance. It would, of course, have to be shown that the retention of the instalments was unconscionable, in all the circumstances.

The first case to which I will refer is *In re Dagenham (Thames) Dock Co.*[5] In that case there was a contract for the sale of land for £4,000 to be paid in two instalments of £2,000 each. The purchaser was let into possession on payment of the first instalment. The date for the second instalment was extended by consent, but it was ultimately agreed that the instalment should be paid by a certain date, that time was to be of the " essence," and that if the instalment was not paid in full by the due date the vendors were to be entitled to re-enter and the £2,000 previously paid, together with any part of the balance paid was to be forfeited. The clause therefore would operate if only a small part of the second instalment remained outstanding. There was a failure to pay the second instalment when due and the vendors began an action of ejectment. The matter came before this court, the vendors relying on the provisions of the contract. James L.J. said[6]: " In my opinion this is an extremely clear " case of a mere penalty for non-payment of the purchase money. " If the agreement were to be construed as the appellants con- " tend, I greatly doubt whether it would not be void as being " ultra vires." Mellish L.J. said[7]: " I have always understood " that where there is a stipulation that if, on a certain day, an " agreement remains either wholly or in any part unperformed— " in which case the real damage may be either very large or very " trifling—there is to be a certain forfeiture incurred, that stipu- " lation is to be treated as in the nature of a penalty." It is not very easy to find out exactly what had happened, but it looks as if the company were willing and able at that stage to produce the residue of the purchase-money and relief was given on payment.

---

[5] (1873) L.R. 8 Ch. 1022.
[6] Ibid. 1025.
[7] Ibid.

It is interesting to compare the words used by the two Lords Justices in that case with Tindal C.J.'s summary of the law as to penalties in *Kemble* v. *Farren*[8]: "But that a very large sum "should become immediately payable, in consequence of the non-"payment of a very small sum, and that the former should not "be considered as a penalty, appears to be a contradiction in "terms; the case being precisely that in which courts of equity "have always relieved, and against which courts of law have, "in modern times, endeavoured to relieve, by directing juries "to assess the real damages sustained by the breach of the "agreement."

As it seems to me, James L.J. is assimilating the retention of instalments, if the result would be penal in its nature, to a provision for the payment of a penalty sum on a breach or breaches. It is a question of the effect of the clause and not of the defendant's conduct.

If that is right, it would seem wrong and, as I think, illogical to hold that no relief could be given where the plaintiff in default was unable to complete. If the Lords Justices had had any such limited principle in mind they would, I think, have worded their judgments differently. I think that this view is supported by *Steedman* v. *Drinkle*,[9] although I agree that sentences in that case could be relied on as supporting the narrower view. There was a provision for forfeiture of instalments, time was of the essence and the buyer defaulted. The buyer sought a decree of specific performance, but as time was of the essence and the defendant was unwilling it was held that this claim failed. The Judicial Committee, however, were of opinion "that the stipulation in question was one for a penalty against "which relief should be given on proper terms." The terms were not settled, and the plaintiff was left to apply to the court of first instance. That, therefore, was a case in which the readiness and willingness could not lead to a decree for specific performance, but if the narrower argument is right readiness and willingness is a condition precedent to any relief being given. This, as I have already said, seems illogical to my mind, if these forfeiture clauses are, as was said in the *Dagenham* case,[10] in the same general category as penalty clauses. I am not, of course, suggesting that the plaintiff's readiness in *Steedman's* case [9] was not relevant to the question whether relief should be given. I am only not satisfied that it is the sole condition of relief. If the Judicial Committee had intended to lay down this limitation it would have done so.

---

[8] 6 Bing. 141, 148.

[9] [1916] 1 A.C. 275.

[10] L.R. 8 Ch. 1022.

In *Mussen* v. *Van Dieman's Land Co.*[11] it was said, I think rightly, that Farwell J. inclined to the narrower view and certainly treated *Steedman's* case [9] as based on the readiness and willingness of the purchaser. On the other hand, I think that he took pains to make it clear that on any view of the facts of that case he did not think that unconscionability was established. In the following passage he was clearly dealing with cases where the penalty principle was invoked by the plaintiff seeking to recover back money. He said [12]: "In order to entitle a plaintiff to "relief from a penalty, it is necessary in my judgment for him "to show that there is some ground upon which it would be "unconscionable in the defendants to retain the money or the "whole of the money. I find it difficult to see why, in a case of "this kind, it should be unconscionable on the part of the vendor, "who has contracted to part with his land on agreed terms, to "enforce the contract if he so desires. There may be special "circumstances in some cases, in which the court would take the "view that it was unconscionable, and that the plaintiff was "accordingly entitled to relief, but unless I can be satisfied that "in this case there is something unconscionable in what the "defendants seek to do, in my judgment I have no jurisdiction "to grant any relief whatsoever. It should be observed that this "is not strictly a case of a penalty at all since the payment in "question was an integral part of the principal contract."

With regard to the last sentence, it was not the payment but its forfeiture which was in question. Any penalty provision is, of course, in one sense a term of the contract, and all the plaintiff was seeking to do in the numerous cases in which equity gave relief was to enforce the bargain. There is, however, I agree, a difference between cases, for example, where a special penalty is added to normal interest and cases like the present where a purchaser has possession on the one hand and instalments are being paid on the other. All I am concerned to say is that in my opinion the cases do not establish (1) that relief could never be given unless the plaintiff could show that he is financially in a

---

[9] [1916] 1 A.C. 275.

[11] [1938] Ch. 253; 54 T.L.R. 225; [1938] 1 All E.R. 210.

[12] [1938] Ch. 253, 262.

C. A.
1953–54

STOCKLOSER
v.
JOHNSON.

Somervell L.J.

position to complete and would be willing to do so if the defendant were himself prepared to waive the breach and complete the contract, or (2) that after rescission no relief can be given unless there is fraud or sharp practice.

There is only one other point on which I should like to express my agreement with the judge. As the basis of the plaintiff's right, if he has one, is the unconscionability of the defendant's retaining sums which have been paid to him as instalments, I agree that the circumstances of the particular case should be looked at and the question is not one to be decided by looking only at the contract.

For the above reasons, I would allow the appeal in respect of the Washington contract and dismiss the cross-appeal.

DENNING L.J. There was acute contest as to the proper legal principles to apply in this case. On the one hand, Mr. Neil Lawson urged us to hold that the buyer was entitled to recover the instalments at law. He said that the forfeiture clause should be ignored because it was of a penal character; and once it was ignored, it meant that the buyer was left with a simple right to repayment of his money on the lines of *Dies* v. *British and International Mining and Finance Corporation*,[13] subject only to a cross-claim for damages. In asking us to ignore the forfeiture clause, Mr. Lawson relied on the familiar tests which are used to distinguish between penalties and liquidated damages, and said that these tests had been applied in cases for the repayment of money, citing *Barton* v. *Capewell*[14] and *Commissioner of Public Works* v. *Hills*.[15] In neither of those cases, however, was the point argued or discussed, and I do not think they warrant Mr. Lawson's proposition. There is, I think, a plain distinction between penalty cases, strictly so called, and cases like the present.

It is this: when one party seeks to exact a penalty from the other, he is seeking to exact payment of an extravagant sum either by action at law or by appropriating to himself moneys belonging to the other party, as in *Commissioner of Public Works* v. *Hills*.[15] The claimant invariably relies, like Shylock, on the letter of the contract to support his demand, but the courts decline to give him their aid because they will not assist him in an act of oppression: see the valuable judgments of Somervell and Hodson L.JJ. in *Cooden Engineering Co.* v. *Stanford.*[16]

---

[13] [1939] 1 K.B. 724.

[14] (1893) 68 L.T. 857.

[15] [1906] A.C. 368.

In the present case, however, the seller is not seeking to exact a penalty. He only wants to keep money which already belongs to him. The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely. He did not obtain it by extortion or oppression or anything of that sort, and there is an express clause—a forfeiture clause, if you please—permitting him to keep it. It is not the case of a seller seeking to enforce a penalty, but a buyer seeking restitution of money paid. If the buyer is to recover it, he must, I think, have recourse to somewhat different principles from those applicable to penalties, strictly so called.

On the other hand, Mr. Beney urged us to hold that the buyer could only recover the money if he was able and willing to perform the contract, and for this purpose he ought to pay or offer to pay the instalments which were in arrear and be willing to pay the future instalments as they became due; and he relied on *Mussen* v. *Van Dieman's Land Co.*[17] I think that this contention goes too far in the opposite direction. If the buyer was seeking to re-establish the contract, he would of course have to pay up the arrears and to show himself willing to perform the contract in the future, just as a lessee, who has suffered a forfeiture, has to do when he seeks to re-establish the lease. So, also, if the buyer were seeking specific performance he would have to show himself able and willing to perform his part. But the buyer's object here is not to re-establish the contract. It is to get his money back, and to do this I do not think that it is necessary for him to go so far as to show that he is ready and willing to perform the contract.

I reject, therefore, the arguments of counsel at each extreme. It seems to me that the cases show the law to be this: (1) *When there is no forfeiture clause.* If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see *Palmer* v. *Temple*[18]; *Mayson* v.

---

[16] [1953] 1 Q.B. 86; [1952] 2 T.L.R. 822; [1952] 2 All E.R. 915.

[17] [1938] Ch. 253.

[18] (1839) 9 Ad. & El. 508.

Clouet[19]; *Dies* v. *British and International Co.*[20]; Williams on Vendor and Purchaser, 4th ed., p. 1006. (2) *But when there is a forfeiture clause or the money is expressly paid as a deposit* (*which is equivalent to a forfeiture clause*), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman* v. *Drinkle*,[21] where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Sumner.

The difficulty is to know what are the circumstances which give rise to this equity, but I must say that I agree with all that Somervell L.J. has said about it, differing herein from the view of Romer L.J. Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money. Inasmuch as the only case in which this jurisdiction has been exercised is *Steedman* v. *Drinkle*,[21] I have examined the record and would draw attention to the circumstances of that case. The agreement was in effect a hire-purchase agreement of land. The purchase-money was payable by instalments over six years, completion to be at the end of the six years, and meanwhile the purchasers were to be let into possession of the land as tenants with the instalments ranking as rent. In case of default the vendor was at liberty to cancel the contract and retain the payments which had been made. The purchasers paid the first instalment and went into possession, but they failed to pay the second instalment which was due at the end of the first year. The value of the land had risen greatly during that year and the vendor seized upon the purchaser's default as giving him the opportunity to rescind the contract. Without previous warning, the vendor gave notice cancelling the contract. The purchasers at once tendered the amount due but the vendor refused to accept it. The purchasers issued a writ for specific performance and meanwhile remained in possession of the land taking the crops off it. They failed to get specific performance in the first court, then succeeded in the Court of Appeal, but failed again in the

---

[19] [1924] A.C. 980; 40 T.L.R. 678.
[20] [1939] 1 K.B. 724.
[21] [1916] 1 A.C. 275.

Privy Council on the ground that time was expressly of the essence of the contract. Nevertheless, the Privy Council relieved the purchasers from forfeiture of the sums already paid. The purchasers would no doubt have to give credit for the crops they had taken from the land during the three years or more that they had been in possession, but subject to that credit they would get their money back.

In the later case of *Mussen* v. *Van Dieman's Land Co.*[22] Farwell J. said that the whole basis of the decision in *Steedman* v. *Drinkle*[23] was that the purchasers were ready and willing to perform the contract; but I think that that is much too narrow an explanation. Readiness and willingness is essential in specific performance, and in relief from forfeiture of leases, but not in relief from forfeiture of sums paid. The basis of the decision in *Steedman* v. *Drinkle*[23] was, I think, that the vendor had somewhat sharply exercised his right to rescind the contract and retake the land, and it was unconscionable for him also to forfeit the sums already paid. Equity could not specifically enforce the contract, but it could and would relieve against the forfeiture.

In the course of the argument before us Somervell L.J. put an illustration which shows the necessity for this equity even though the buyer is not ready and willing to perform the contract. Suppose a buyer has agreed to buy a necklace by instalments, and the contract provides that, on default in payment of any one instalment, the seller is entitled to rescind the contract and forfeit the instalments already paid. The buyer pays 90 per cent. of the price but fails to pay the last instalment. He is not able to perform the contract because he simply cannot find the money. The seller thereupon rescinds the contract and retakes the necklace and resells it at a higher price. Surely equity will relieve the buyer against forfeiture of the money on such terms as may be just.

Again, suppose that a vendor of property, in lieu of the usual 10 per cent. deposit, stipulates for an initial payment of 50 per cent. of the price as a deposit and a part payment; and later, when the purchaser fails to complete, the vendor resells the property at a profit and in addition claims to forfeit the 50 per cent. deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than he can recover a penalty by calling it liquidated damages.

---

[22] [1938] Ch. 253.

[23] [1916] 1 A.C. 275.

C. A.
1953–54

STOCKLOSER
v.
JOHNSON.

Denning L.J.

These illustrations convince me that in a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates, not because of the plaintiff's default, but because it is in the particular case unconscionable for the seller to retain the money. In short, he ought not unjustly to enrich himself at the plaintiff's expense. This equity of restitution is to be tested, I think, not at the time of the contract, but by the conditions existing when it is invoked. Suppose, for instance, that in the instance of the necklace, the first instalment was only 5 per cent. of the price; and the buyer made default on the second instalment. There would be no equity by which he could ask for the first instalment to be repaid to him any more than he could claim repayment of a deposit. But it is very different after 90 per cent. has been paid. Again, delay may be very material. Thus in *Mussen's* case [24] the court was much influenced by the fact that the purchaser had allowed nearly six years to elapse before claiming restitution. He had already had a good deal of land conveyed to him and, during his six years delay, values had so greatly changed that it may be that he had had his money's worth. At any rate, it was not unconscionable for the defendant to retain the money.

Applying these principles to the present case, even if one regards the forfeiture clause as of a penal nature—as the judge did and I am prepared to do—nevertheless I do not think that it was unconscionable for the seller to retain the money. The buyer seems to have gambled on the royalties being higher than they were. He thought that they would go a long way to enable him to pay the instalments; but owing to bad weather they turned out to be smaller than he had hoped and he could not find the additional amount necessary to pay the instalments. The judge summarized the position neatly when he said that the purchaser "is in the "position of a gambler who has lost his stake and is now saying "that it is for the court of equity to get it back for him." He said, "if it is a question of what is unconscionable, or, to use a "word with a less legal flavour, unfair, I can see nothing "whatever unfair in the defendant retaining the money." With that finding of the judge I entirely agree and think that it disposes of the purchaser's claim to restitution.

---

[24] [1938] Ch. 253.

Despite this finding, however, the judge did allow the buyer to recover the instalments he had paid on the Washington quarry. The reason was because, after the buyer made default, the seller bought up the interest of the Renown company in the quarry and thereby disabled himself from fulfilling the contract with the buyer if called upon to do so. I do not myself think that in this case that makes any difference. It might have done if there had been no forfeiture clause and the buyer was claiming at law for the return of his instalment; because then the buyer would have to show that the seller had treated the contract as at an end, see *Palmer* v. *Temple.*[25] But the buyer here cannot claim at law. There is a forfeiture clause which prevents him doing so. He can only claim in equity; and he does not gain an equity simply because the seller has bought up the quarry. I do not think, therefore, that the judge was right in allowing the buyer to recover the instalments which he had paid on the Washington quarry. The buyer should not be allowed to recover anything. I agree that the appeal of the seller should be allowed, but the cross-appeal should be dismissed.

ROMER L.J. It appears to me that it is an essential foundation for the purchaser's contention to the effect that clause 5 of the agreement of April 6, 1950, and the corresponding clause (clause 6) of the agreement of June 24, 1950, operated as penalties, from which he is entitled to be relieved, that he should be able to establish that on the true construction of those clauses the vendor would be entitled, on the default of the purchaser in paying an instalment, not only to retain the instalments which had been previously paid but also to recover from the purchaser the royalties which he had received from the hirers of the plant. I say this because where A agrees to sell an income-producing asset to B by deferred payments, and it is expressly provided in the contract that if B (who is allowed to enter into immediate possession) defaults in payment of an instalment, A may rescind, and thereupon B shall forfeit the instalments which he has paid but shall be entitled to retain the income which he has received, no question of a penalty can arise—and a fortiori where profits and instalments are likely to be equated to the extent which my Lord has indicated in his judgment; and the position is the same if a bargain to that effect is implicit in the contract although not introduced into it by express language. It is only if a purchaser, on default, forfeits to the vendor both past instalments and past profits of an income-producing asset that he can be regarded as entering the area of jurisdiction which the purchaser is seeking to invoke in the present case.

---

[25] 9 Ad. & El. 508, 521.

What, then, was the position in this regard under the relevant clauses in the two agreements? In my opinion it is quite plain that, on the vendor rescinding by reason of the purchaser's default, the ensuing forfeiture was to operate only on past instalments of the purchase moneys and that the purchaser was to be left in undisturbed possession of the royalties which he had previously received. The purchaser's contention to the contrary was entirely based on the provision in the clauses that, if the vendor elected to " rescind," he was to be entitled again to enter into enjoyment of the hiring agreements and the fruits thereof " as though " the agreements between vendor and purchaser " had never been executed." The argument is that if the agreements had never been executed the vendor would have been entitled to all the profits of the hiring agreements and that the object of the clauses was to restore these profits to him on rescission. In my judgment the judge was quite right in rejecting this argument, which involves the conception of rescission ab initio, with the result, inter alia, that the vendor would be automatically deprived of any accrued rights arising from the indemnities contained in the first and second agreement. It is quite clear to me that the contemplated " rescissions " were not to operate retrospectively and that the " fruits " of the hiring agreements which the vendor was " again " (a word not without significance) to enjoy were confined to future profits.

On this view of the matter, as I have already indicated, no question of penalties or relief therefrom arises and the plaintiff's claim against the defendant wholly fails; with the result that the defendant's appeal should be allowed and the cross-appeal should be dismissed. Out of deference, however, to the argument which was addressed to us on the assumption that the forfeiture clause in each agreement constituted a penalty, or something in the nature of a penalty, I should like to deal with the question of whether the purchaser could have successfully sought the intervention of equity, in relation to the contractual results of these provisions, if the profit-producing quality of the properties to which I have referred had not existed. The matter was considered by the late Farwell J. in *Mussen's* case,[26] but before referring further to that case it would be convenient to consider the point as one of principle.

---

[26] [1938] Ch. 253.

Generally speaking, courts of equity have never interfered with contracts merely by reason of their being improvident. "The "Chancery," as Lord Nottingham said in *Maynard* v. *Moseley*,[27] "mends no man's bargain." To this rule exceptions were made, notably in favour of expectant heirs and borrowers, to whom equity manifested some tenderness, on the supposition that the sale or mortgaging of their inheritances or properties was usually induced by the pressure of financial need. Such persons were regarded as being to some extent at the mercy of persons who were willing, on terms, to enter into financial relations with them, and the court frequently intervened so as to relieve them from the strict letter of their obligations upon such conditions as it considered fair and just. The equity of redemption which mortgagors have enjoyed for over 300 years had its origin in this exceptional jurisdiction and may be taken as an example of it.

In general, however, as I have said, people were expected to abide by their contracts, and if a man made a foolish or improvident one so much the worse for him. The question, then, is whether a purchaser who freely and voluntarily negotiates and executes a contract of sale upon terms that the price is to be paid by instalments and that, on default by him of payment of any instalment, the vendor may rescind the contract and retain any instalments previously paid, is entitled to relief in equity if he finds himself unable to comply with his bargain. It is to be observed that, in such a case, no element of pressure or duress exists and no question of the purchaser acting under the stress of economic necessity; both parties to the contract are on terms of bargaining equality with each other, the one desiring to exchange cash for property, the other desiring to exchange property for cash. I confess that, in these circumstances, I am unable to see what ground there is for interference by a court of equity if it ultimately turns out that the terms on which these exchanges are mutually agreed operate hardly on either vendor or purchaser. If one of the terms which the vendor requires is disagreeable to the purchaser he is under no compulsion to accept it; he can either keep his money and forgo the property or he can purchase a similar property from some other vendor who is more tolerant in his approach to the conditions of sale.

If a man agrees to buy property by instalments which he will

---

[27] (1676) 3 Swanst. 651, 655.

C. A.
1953–54

STOCKLOSER
v.
JOHNSON.

Romer L.J.

forfeit to the vendor if he cannot continue them to completion, he knows perfectly well the risk which he is taking and I do not know what right he has to appeal to equity if that risk does in fact ripen into actuality. That was the view which Farwell J. expressed without hesitation in *Mussen's* case,[28] and I respectfully and entirely agree with it. There are, however, reported cases in which equity has given partial and conditional relief to purchasers who default in their payments on the footing that such a forfeiture clause amounts to something in the nature of a penalty. In *In re Dagenham* (*Thames*) *Dock Co.*[29] a statutory company agreed to purchase certain land for the purposes of its undertaking. The contract provided for an immediate payment of £2,000 and that the balance of the price should be paid on a subsequent date (time to be of the essence), and it was stipulated that on default by the company in making punctual payment of that balance the vendors should recover possession of the entire property and the original £2,000 should be forfeited to them. The company did in fact make default in payment of the balance, and a month later an order was made to wind it up. Shortly afterwards the vendors sued in ejectment and obtained an order by consent to sign judgment, they undertaking not to issue execution until further order and to abide by any order the court might make as to the property comprised in the contract.

It seems from the papers at the Record Office that negotiations for the payment of the outstanding purchase-money then took place, but as they were fruitless the vendors applied for liberty to issue execution and for delivery up of the land free from all claims by the company. Lord Romilly M.R. offered them relief appropriate to the enforcement of a vendor's lien, but this was refused and thereupon the Master of the Rolls declined to make any further order. On appeal James and Mellish L.JJ. agreed with the Master of the Rolls in refusing to make the order for which the vendors were asking. It is interesting, however, to note exactly what they did. Whether or not they were asked to do so by the liquidator of the company I do not know (though I gather from the papers that they were not), but they did not declare that the stipulation for forfeiture was void as against the company as being a penalty or something in the nature of a penalty; all that the Lords Justices did was to relieve the company from its operation *on payment of the residue of the purchase-money with interest*. In other words, they, in effect, extended the time for payment of the balance in spite of the provision that time was to be of the essence of the contract—a course which was plainly justifiable if only by reason of the fact that the plaintiffs themselves had twice postponed the date which had been originally agreed for the payment. The plaintiffs filed an affidavit on their application to the Master of the Rolls in which they stated that the liquidator of the company had represented that, if further time were allowed, the company would be able to come to some satisfactory arrangement; and presumably the court was satisfied that there was a reasonable prospect of the company being able to satisfy the vendors, if extra time were given, for otherwise there was no object in allowing them a further chance of completing the contract.

---

[28] [1938] Ch. 253.

[29] L.R. 8 Ch. 1022.

Kilmer v. *British Columbia Orchard Lands Ld.*[30] was another case in which similar relief was given to a purchaser who was in default but desired further time to complete his obligations. Under the contract (as appears from the judgment of the Judicial Committee) the purchase-money was to be paid together with interest by specified instalments at certain specified dates. Time was declared to be of the essence of the agreement. In default of punctual payment at an appointed date of the instalment of purchase-money and the interest then payable or any part thereof the agreement was to be null and void, all payments made under the agreement were to be absolutely forfeited to the vendor and the vendor was to be at liberty to resell the property immediately. The purchaser was let into possession upon payment of the first instalment on the execution of the agreement, but defaulted in payment of a subsequent instalment. The vendors thereupon sued for a declaration that the agreement was null and void. The purchaser counterclaimed for specific performance and when the case came on for trial obtained leave to pay into court the amount which he still owed under the contract. The trial judge dismissed the action and decreed specific performance on the counterclaim, relieving the purchaser from any forfeiture or penalties incurred. The Court of Appeal of British Columbia reversed that decision and declared the agreement null and void. The Privy Council concluded that the case fell substantially within the decision of the *Dagenham Dock Co.* case[31] (which they impliedly approved) and restored the order which the trial judge had made dismissing the action and decreeing specific

[30] [1913] A.C. 319.

[31] L.R. 8 Ch. 1022.

performance (a course which was only justified, as is pointed out in *Steedman* v. *Drinkle* [32] on the footing that the vendors had waived the stipulation as to time being of the essence—and therefore had not validly rescinded the contract).

In *Kilmer's* case,[33] therefore, as in the *Dagenham Dock* case,[31] the court intervened by giving a purchaser who, although in default in punctual payment, desired a further chance of completing his purchase, an opportunity of doing so. So far as I can see, in neither of those cases did the court declare, or even intimate, that the purchaser should be relieved from the forfeiture if he failed through want of funds to take advantage of the limited relief which was extended to him—although admittedly there was little reason to deal with this point in *Kilmer's* case [33] as the purchaser had brought the whole of the unpaid purchase-money and interest into court.

Apart from *Steedman* v. *Drinkle* [32] (to which I will return) two other cases require mention, though I do not think that either of them has much bearing on the present question. The first is *Commissioner of Public Works* v. *Hills*.[34] In that case a railway contractor was relieved from the forfeiture of certain sums of money notwithstanding that he became contractually liable to forfeit them, but (as was pointed out by Lord Dunedin in the *Dunlop Pneumatic Tyre Co.* case [35]) the question there was whether those sums were penalties (in the strict sense) or liquidated damages, and the Judicial Committee held that they were the former. The second is *Mayson* v. *Clouet* [36] where a defaulting purchaser, although adjudged liable to forfeit his deposit, was held entitled to recover, on rescission by the vendor, subsequent instalments of purchase-money which he had paid. Lord Dunedin, in delivering the judgment of the Privy Council, said that questions such as that which was before them must always depend on the terms of the particular contract and that on the construction of the agreement between Mayson and Clouet only the deposit was forfeitable. The purchaser does not appear to have contended, as an alternative to his submission on construction which succeeded, that if in fact the forfeiture clause operated on the subsequent instalments as well as on the initial deposit it should be regarded pro tanto as being a penalty, and the Board did not expressly deal with the matter from that aspect, though Lord

[31] L.R. 8 Ch. 1022.
[32] [1916] 1 A.C. 275,
[33] [1913] A.C. 319.
[34] [1906] A.C. 368.
[35] [1915] A.C. 79.
[36] [1924] A.C. 980.

Dunedin said[37]: "The truth is that the (vendors') contention "really amounts to a claim to keep the instalments as liquidated "damages for the breach of contract for which they are entitled "to sue."

Pausing then at this point, it appears to me that the cases establish that if a purchaser defaults in punctual payment of instalments of purchase-money the court will, in a proper case, relieve the purchaser from his contractual liability to forfeit instalments (apart from the deposit) already paid to the extent of giving him a further chance and further time to pay the money which is in arrear if he is able and willing to do so; but the cases do not, in my judgment, show that the court will relieve such a purchaser to any further extent than this.

The decision of the Privy Council in *Steedman* v. *Drinkle*[38] would at first sight appear to have gone further than this and to have relieved a defaulting purchaser from forfeiting past instalments notwithstanding that the vendor had already validly rescinded the sale agreement so that there was no question of the purchaser, by being given further time, being able to complete the purchase. So far, however, as one can gather, this point was not really in issue, nor could it be having regard to the pleadings in the case. The purchase-money under the contract in question was 16,000 dollars, which was payable as to 1,000 dollars on the signing of the agreement and as to the balance by six annual instalments on December 1 in each year. The purchaser paid the 1,000 dollars but his assigns defaulted in the payment of the first of the instalments and the vendors thereupon gave notice cancelling the agreement. Three weeks or so after the date on which the instalment should have been paid the assigns tendered the amount thereof to the vendor, who declined to accept it. The assigns accordingly started an action in which they claimed specific performance of the contract and, alternatively, relief from forfeiture of their rights and interest under the agreement and of their equitable rights or interest in the lands, upon terms. The vendor counterclaimed for a declaration that the agreement had been validly determined. The trial judge held that as the contract had made time of the essence he could not grant the plaintiffs relief against the forfeiture of their interest in the land; in other words, he could not grant them a decree of specific performance.

There was, however, a provision in the contract that if the purchaser defaulted in any of the payments the vendor might, in addition to cancelling the agreement, retain any payments made on account of it as and by way of liquidated damages; and the judge intimated that he was prepared to allow an amendment of the statement of claim so as to relieve the plaintiffs from forfeiture, under this provision, of the amount paid. The plaintiffs, however, refused this offer as they wanted a decree of specific performance. They appealed to the Supreme Court of Saskatchewan who, reversing the trial judge's decision, granted the plaintiffs a decree. From this order the vendor appealed to the Judicial Committee. The issue, therefore, before the Board was not whether the plaintiffs should be relieved from forfeiting the amount which had been already paid (an issue which they had declined the opportunity of raising) but whether they were or were not entitled to a decree of specific performance. The Board allowed the vendor's appeal on the ground that he had validly rescinded the agreement, which could not, therefore, be enforced against him.

---

[37] [1924] A.C. 987.

[38] [1916] 1 A.C. 275.

In the course of their judgment they did, however, say that the provision for forfeiting instalments already made was one for a penalty against which relief should be given on proper terms and that, for that purpose, the plaintiffs should have liberty to apply to the court of first instance. As to that the following comments suggest themselves: (1) The point does not appear to have been argued, and had not been introduced as an issue by the purchasers when they were invited by the trial judge to rely upon it as a ground for conditional relief. (2) It may well be that the vendor did not contest it. Had he done so he would hardly have been given (as he was given) the whole of his costs of the appeal to the Privy Council and of the proceedings in the courts below. (3) It would appear that as the plaintiffs had not even paid the first of the deferred annual instalments the only sum affected by the forfeiture clause was the 1,000 dollars which had been paid on the signing of the agreement, which may explain why neither side seems to have attached much importance to the matter. (4) It is not altogether clear why this sum was not forfeitable to the vendor as a deposit: *Howe* v. *Smith.*[39]

In *Mussen's* case[40] Farwell J. was obviously a little puzzled by *Steedman* v. *Drinkle.*[41] After considering the case he said that in his judgment it turned upon its own particular circumstances and was of no general application; he then said[40]: "In

---

[39] (1884) 27 Ch.D. 89.
[40] [1938] Ch. 253, 266.
[41] [1916] 1 A.C. 275.

"my judgment the whole basis of that decision turns upon the "fact that the appellant was ready and willing to perform the "contract and the only reason why performance was impossible "was that the respondents refused to agree and the terms of the "contract made it impossible for the court to decree specific "performance. The court appears to have thought that it was "unconscionable for the respondents to take up the attitude of "saying: 'We will not complete but we will retain the money' "and on that ground relief could be granted." Whether that be the true explanation, or whether the explanation is that the point was assumed or conceded, I am certainly in agreement with Farwell J. that the case was a special one and cannot be treated as of general application. In my judgment the decision cannot be regarded as a satisfactory authority for the view that an equity exists in a purchaser, as against a vendor who has validly rescinded the agreement by reason of the purchaser's default, to recover instalments of purchase-money which the vendor is contractually entitled to retain. Farwell J. in *Mussen's* case [42] expressed the opinion that there is no such equity and I agree with him.

There is, in my judgment, nothing inequitable per se in a vendor, whose conduct is not open to criticism in other respects, insisting upon his contractual right to retain instalments of purchase-money already paid. In my judgment, there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so; and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice or other unconscionable conduct of the vendor, to a purchaser after the vendor has rescinded the contract.

My brother Denning in his judgment has referred to the hypothetical case which was suggested during the argument of a purchaser who buys a pearl necklace on terms that the purchase price is to be payable by instalments and that the vendor is to be entitled to get the necklace back and retain all previous payments if the purchaser makes default in the punctual payment of any instalment, even the final one. It would certainly seem hard that the purchaser should lose both the necklace and all previous

---

[42] [1938] Ch. 253.

C. A.
1953–54

STOCKLOSER
v.
JOHNSON.

Romer L.J.

instalments owing to his inability to pay the last one. But that is the bargain into which the purchaser freely entered and the risk which he voluntarily accepted. The court would doubtless, as I have already indicated, give him further time to find the money if he could establish some probability of his being able to do so, but I do not know why it should interfere further; nor would it be easy to determine at what point in his failure to pay the agreed instalments the suggested equity would arise. In any event I venture to suggest that it is extremely unlikely that such a case would occur in practice; for a purchaser who had paid, say, nine-tenths of the agreed price for the necklace would have little difficulty in borrowing the remaining one-tenth on the security of his interest therein.

It will appear from what I have already said that in my opinion *Mussen's* case [42] was rightly decided and that I agree with the grounds and reasoning upon which the decision was based, namely, that subject to the exceptions or qualifications to which I have referred (and which Farwell J. in terms recognized), there is no "equity . . . in favour of a purchaser who has failed to complete "his contract through no fault of the vendor." For my part I share the reluctance which Farwell J. expressed to sponsor such an equity; it seems to me that in the long run it is much better that people who freely negotiate and conclude a contract of sale should be held to their bargain rather than that the judges should intervene by substituting, each according to his own individual sense of fairness, terms which are contrary to those which the parties have agreed upon for themselves. Agreeing as I do with Farwell J.'s judgment, no useful purpose would be served by further considering the case beyond emphasizing (possibly ex abundanti cautela) that the decision of Farwell J. was not directed to relief from penalties in the strict sense, but from the forfeiture of sums which the purchaser had paid in pursuance of the contract and in part payment of the purchase-money for the property agreed to be sold.

I have dealt with this question at, I am afraid, some length because it is an important one and because we heard considerable argument on at least some aspects of it. It does not in truth arise in the present case because, on the facts and on the true construction of the agreements between the plaintiff and the defendant, nothing in the nature of a penalty (or indeed of a forfeiture in any real sense) enters into the picture. I would, however, like to point out that the plaintiff could not, in my opinion, invoke any equitable jurisdiction or remedy in the present case. Even after the defendant rescinded he invited the plaintiff to make some proposal for the belated fulfilment of his obligations, but without any response from the plaintiff, who never made the slightest attempt to remedy his default. But, further, although it appears that he received a sum of £4,000 from Canada he paid none of it towards the discharge of his obligations to the defendant, but diverted it all elsewhere; and conduct of that kind is a poor qualification in a suitor for equitable relief.

---

[42] [1938] Ch. 253.

In my opinion the judge, in his careful judgment in this case, came to a right conclusion (on the footing that a penalty was involved) in refusing to give relief to the plaintiff in respect of the Playhatch agreement; but, with respect, I think he was in error in giving relief in respect of the Washington agreement because, although the defendant, after rescinding, did take over the Renown company's lease he was under no obligation whatever to the plaintiff not to do so. His rescission of the Washington agreement was perfectly lawful, and nothing that happened thereafter could affect the rights which accrued to him as a result of putting an end to it. Further, as I have already indicated, no equity exists, in my opinion, in favour of a purchaser after the vendor has validly rescinded in the absence, at all events, of special circumstances of a kind which certainly did not exist in the present case. I agree with the order which my Lord has proposed.

Appeal allowed and cross-appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Lovell, Son & Pitfield, for Pitfield & Oglethorpe, Petworth; Kenneth Brown, Baker, Baker.*

A. W. G.

REGINA v. JURA.

C. C. A.
1954
Mar. 8
Lord Goddard C.J., Slade and Gerrard JJ.

Criminal Law—Carrying offensive weapon—Lawful authority or reasonable excuse—Air rifle being used at shooting gallery fired at bystander—Prevention of Crime Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 14), *s.* 1 (1).

While using an air rifle at a shooting gallery in a public park, the appellant, in a moment of anger, turned the rifle towards a woman companion as she was walking away and fired at her causing her injury. The appellant was charged under the Prevention of Crime Act, 1953, s. 1 (1), with carrying an offensive weapon without lawful authority or reasonable excuse in a public place. In his summing up, the judge directed the jury that if the firing of the rifle at the woman was an accident then the appellant was not unlawfully in possession of the rifle and that his possession only became unlawful if, in the opinion of the jury, he turned the rifle deliberately on the woman. The appellant was convicted. On appeal:—

Held that, in the circumstances, it was not the possession but the use of the rifle which was unlawful and, although the appellant might have been convicted of a felony under the Offences against the Person Act, 1861, he had committed no offence against the Act of 1953, and, therefore, he had been wrongly convicted.

APPEAL against conviction.

On August 14, 1953, the appellant, Stanislaw Jura, in company with a woman, went to Lister Park, Bradford, where there was a shooting gallery and, after firing some shots at the target, in a moment of anger turned round and fired at the woman as she was walking away and hit her in the hip causing a slight wound.

The appellant was tried before Oliver J. at the Leeds Assizes on December 15, 1953, on an indictment containing four counts. On the first count he was charged with shooting with intent; on the second with common assault; on the third with possessing firearms with intent, and on the fourth count with carrying an offensive weapon without lawful authority or reasonable excuse in a public place, contrary to the Prevention of Crime Act, 1953.[1]

At the trial the jury failed to agree on the first count and were discharged from giving a verdict. On the second count they convicted the appellant and he was sentenced to six months' imprisonment. The appellant was acquitted on the third count, but convicted on the fourth and sentenced to eighteen months' imprisonment to run concurrently with the sentence on the second count.

The appellant appealed against his conviction on the fourth count.

---

[1] Prevention of Crime Act, 1953, s. 1 (1): "Any person who without "lawful authority or reasonable ex- "cuse, the proof whereof shall lie on "him, has with him in any public "place any offensive weapon shall be "guilty of an offence, and shall be "liable (*a*) on summary conviction, "to imprisonment for a term not "exceeding three months or a fine not "exceeding £50 or both; (*b*) on con- "viction on indictment, to imprison- "ment for a term not exceeding two "years or a fine not exceeding £100, "or both."

Geoffrey Baker for the appellant. It is submitted that the facts do not come within the Act of 1953 on the grounds, first, that the appellant had the rifle with lawful authority, and, secondly, the rifle was not an offensive weapon. The user of the rifle might have been unlawful, but the Act does not speak of "use" but is designed to legislate against "possession." If the appellant had taken the rifle to the park he might have been guilty of an offence, but in the circumstances his wrongful user did not terminate his lawful possession. If the appellant was guilty of an offence it would mean that a gamekeeper at a shooting party who lost his temper and fired his gun at someone would become an offender under the Act. Likewise a soldier who struck a comrade on the head with the butt of his rifle.

J. S. Snowden for the Crown. The facts are sufficient to come within the Act. Although the appellant might have had a reasonable excuse for carrying the weapon for shooting at the target, once he turned away he brought himself within the section. Anybody carrying an offensive weapon is within the section; the onus is on the accused to show that he had a lawful excuse for carrying it; for example, if a man is carrying a knife quite properly and then uses it to break into a shop, his possession of it becomes unlawful.

LORD GODDARD C.J. stated the facts and continued: The judge directed the jury on the fourth count in these words: "There was an Act passed this very year and it was passed "primarily to deal with those young gentlemen who are often "referred to as 'cosh boys.' This was intended to deal, prima "facie, with them, but the language is quite wide enough to cover "this case. This is the charge of being, without lawful excuse, "in a public place, namely, Lister Park, in possession of an "offensive weapon, namely, an air rifle. There again we come "back to exactly the same position. If this was an accident, "pure fortuity, then he is not unlawfully in possession of an air "rifle. His possession only becomes unlawful if, in your opinion, "he turned the rifle deliberately upon the woman. Then immediately his possession of it becomes unlawful and he is in "possession of an offensive weapon in a public place."

I do not think that that direction can be upheld. The long title of the Prevention of Crime Act, 1953, is: "An Act to "prohibit the carrying of offensive weapons in public places with"out lawful authority or reasonable excuse." [His Lordship read section 1 (1).]

The appellant was not carrying this rifle without lawful excuse because he was at a shooting gallery where for the payment of a few pence people can amuse themselves by firing at a target. He was carrying the rifle for that purpose, so he had an obvious excuse for carrying it. It was his use of the rifle which was unlawful, and for which he might have been convicted of a felony. If a person having a rifle in his hand for a lawful purpose suddenly uses the rifle for an unlawful purpose, the Offences against the Person Act, 1861, provides appropriate punishment. The Act of 1953 is meant to deal with a person who goes out with an offensive weapon, it may be a cosh or a knife, without any reasonable excuse. If the judge's direction were right it would mean that anybody in possession of a shotgun going to a shooting party who used the gun for an unlawful purpose would be guilty of an offence under this Act. He would be guilty of an offence under the Offences against the Person Act, 1861. In my opinion, there is no evidence that the appellant was carrying the weapon without reasonable excuse, and, therefore, the judge ought to have directed the jury to acquit on the fourth count. Consequently, on this count the conviction will be quashed, but the appellant will complete his sentence on the second count.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Town Clerk, Bradford.*

J. D. P.

C. A.
1954
Feb. 26.
Evershed M.R. Denning and Morris L.JJ.

HENRY *v.* TAYLOR.

[1953 T. No. 1459.]

Landlord and Tenant—Rent tribunal—Furnished premises—Rent registered — Payment of excess rent — Amount recoverable — Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 4.

Where the rent payable in respect of furnished premises has been entered on the register kept by a local authority pursuant to the provisions of the Furnished Houses (Rent Control) Act, 1946, and a sum in excess of the rent so entered has been paid by a tenant on account of rent, the sum recoverable under the provisions of section 4 (2) of that Act is the sum paid over and above the registered rent, not the entire rent paid.

Decision of Croom-Johnson J. reversed.

APPEAL from Croom-Johnson J.

On January 22, 1953, the defendant, Mrs. Ann Taylor, let to the plaintiff, Miss Veronica Henry, a furnished room at 35, Manchester Street, Marylebone, at the rent of £2 15s. a week. On April 13, 1953, the plaintiff moved to another furnished room in the same house paying the same weekly rent of £2 15s. On May 11, 1953, the plaintiff gave up possession of the second room. During the 14 weeks that the plaintiff was a tenant she paid to the defendant rent at the rate of £2 15s. a week, making in all a total payment of £38 10s. At all material times the sum of £2 10s. was the sum entered upon the register kept for that purpose by the Metropolitan Borough of St. Marylebone pursuant to the provisions of the Furnished Houses (Rent Control) Act, 1946,[1] as being the rent payable for the first room let to the plaintiff, and the sum of £1 18s. as being the rent payable for the second room let to her. In this action the plaintiff claimed to recover the sum of £38 10s., being the total amount of rent which she had paid. The defendant admitted that the plaintiff had made overpayments amounting to £1 19s. 6d., and she had repaid that sum.

Croom-Johnson J. gave judgment for the plaintiff for £36 10s. 6d., being the full amount of her claim, less the sum of £1 19s. 6d. which the defendant had repaid.

The defendant appealed.

J. W. Borders for the defendant landlord. The question raised by this appeal is whether in the phrase "payment of any sum in "excess of the rent so entered" in section 4 (1) of the Furnished Houses (Rent Control) Act, 1946, "in excess" means over and above the registered rent or the whole rent, if that is greater than the registered rent. It is a straining of language to suggest that "in excess" means the whole rent, so that the tenant can recover all the rent paid and not merely the sum paid over and above the registered rent. The Rent Restrictions Act of 1920, which has been in operation for over 30 years, contains provisions for repayment to a tenant who has made rent payments exceeding the permitted rent, yet it has never been suggested that a tenant was entitled to be repaid the whole rent he had paid. On the true construction of section 4 (2) the payment recoverable is the sum paid over the registered rent. [Reference was made to *Barrell* v. *Fordree* [2]; *Laidlaw* v. *Wilson*,[3] and *Gluchowska* v. *Tottenham Borough Council*.[4]]

---

[1] Furnished Houses (Rent Control) Act, 1946, s. 4: "(1) Where the rent "payable for any premises is entered "in the register . . . it shall not be "lawful to require or receive (*a*) on "account of rent for those premises "in respect of any period subsequent "to the date of such entry, . . . payment of any sum in excess of the "rent so entered . . . (2) Where any "payment . . . has been made or "received in contravention of the foregoing subsection, the amount . . . "thereof shall be recoverable by the "person by whom it was made. . . ."

S. K. de Ferrars for the plaintiff tenant. The tenant is suing upon a statutory right. It is accordingly necessary first to consider what that right is and how it arises. In section 4 where a reference is made to "payment," the reference must be to the whole rent which the tenant has paid. The offence is committed when the landlord receives payment of rent in excess of the registered rent. The landlord only receives one payment. It follows that in subsection (2) the payment which is recoverable is the payment which the tenant has made, that is, the whole payment. That this is the true construction appears from section 9 of the Act. In that section, which imposes a penalty, only the sum paid over the permitted rent is recoverable. If the whole rent paid is recovered by the tenant, it may be that the landlord could then sue the tenant under the contract of tenancy for the registered rent. There is a parallel case in section 9 of the Rent Restrictions Act of 1920, but there Parliament has made it clear that what is recoverable is the sum paid above the permitted rent. Unless Parliament expressly divides up a payment, it is indivisible and the court is not entitled to divide the payment into two parts. Section 4 is intended to prevent an abuse. The landlord must know the registered rent. The penalty is that if he charges too much then the whole rent is recoverable. The decision in *Mauray* v. *Durley Chine (Investments) Ld.*[5] shows that a tenancy under which a rent in excess of the registered rent is payable is an unlawful contract.

J. W. Borders in reply. If section 4 means what the tenant contends it does, absurd results might follow. A tenant may knowingly for weeks continue to pay a rent in excess by a trifling sum of the registered rent and then recover the whole rent.

EVERSHED M.R. As Croom-Johnson J. observed, the point raised in this appeal is a short one, and we have had, as the judge had, the assistance of very clear argument. The question arises out of and upon the true interpretation of section 4 of the Furnished Houses (Rent Control) Act, 1946. It will assist towards a clear statement of my reasoning if I take one imaginary tenant and suppose that, in respect of the subject-matter of his tenancy there had been registered a rent of 20s. per week, and that the landlord had in fact demanded and received rent at the rate of 25s. per week, 5s. over or in excess of the registered amount. The question which has arisen in this action is whether, the landlord having demanded and having received 25s., the tenant can now recover not merely the excess 5s. but the whole amount of 25s. That depends upon the construction of section 4 which, as Mr. de Ferrars rightly pointed out, gives to the tenant, who has been overcharged in respect of rent, a statutory right of recovery.

---

[2] [1932] A.C. 676; 48 T.L.R. 482.

[3] [1894] 1 Q.B. 74; 10 T.L.R. 18.

[4] [1954] 2 W.L.R. 302; [1954] 1 All E.R. 408.

[5] [1953] 2 Q.B. 433; [1953] 3 W.L.R. 296; [1953] 2 All E.R. 458; affirming [1953] 1 W.L.R. 524; [1953] 1 All E.R. 712.

In the case supposed, illustrative of the present action, the claim is made under subsection (2). This renders it then necessary to ask whether there has been a payment "in contra-"vention of the foregoing subsection." What does that phrase mean? So far, I think, the answer is not difficult. A payment "in "contravention of the foregoing subsection" is what is described as "on account of rent . . . payment of any sum in excess of the "rent" entered on the register. I would myself be disposed to think, with Mr. de Ferrars, that the strict English construction of those words is that the payment referred to in the formula was the whole amount of 25s., that being what was paid. That sum, being a sum in excess of the rent registered, was paid "on account "of rent." But I do not think that that is a necessary construction. I think that it is alternatively permissible to construe this language by reading paragraph (*a*) to mean "on account of "rent payment of a sum over and above," that is, in addition to, "the registered rent": expressed by reference to the hypothetical figures given, that is 5s. rather than 25s. If that is the meaning of paragraph (*a*), then it necessarily follows that the payment made "in contravention of the foregoing subsection" was the payment of the additional 5s. on account of rent.

There being, therefore, two views, and the section being (as I think it is) equivocal in the language which is used, which construction should be preferred? The judge adhered to what I have called the stricter construction; but, with all respect to him, I have reached myself the opposite conclusion. In my judgment the right answer is that for which Mr. Borders contended, namely, that the phrase "payment of any sum in excess "of the rent" does not mean in its context payment of a sum which is in fact greater than the registered rent, but means payment of a sum over and above, or in addition to, the registered rent.

I am led to that conclusion by two considerations. First of all, it is a well-known maxim of the construction of statutes that the court should prefer a construction which appears more consonant with justice and reason and tends against anything likely to lead to an absurd result. If Mr. de Ferrars is right, it will follow that the tenant, who has overpaid for some period of time, can recover not merely the overpayment but the whole of the rent paid. What will be the effect of that? Mr. de Ferrars was disposed to concede that since, in the event supposed, the tenant would have occupied without paying any rent at all, and, indeed, occupied under an unlawful contract, he would be unable to resist an application for possession. I am not saying that that is a correct solution. Another possible view would be that the tenant, having recovered the full sum paid, would be then liable to be sued under the contract of tenancy for the right amount of rent, which would produce, in the end, the result that what the tenant would have recovered would be the excess previously paid by him. Either of those alternatives seems to me to be a somewhat extravagant conclusion to flow from the section as Mr. de Ferrars has construed it.

I would add this further observation. I follow perfectly that where a rent has been registered, then the registered rent should be well known to the landlord. He may (but not necessarily will) have been a party to the application to the rent tribunal. Certainly he would not be able to shelter behind any ignorance of what the rent tribunal had fixed. Mr. de Ferrars contends that Parliament deliberately in these cases put a severe sanction on adherence by landlords to the appropriate rent as fixed by the tribunal. That is plainly an intelligible view for Parliament to have taken; but there is no doubt whatever that the sanction or penalty attached would be exceedingly severe. As I have already explained, if Mr. de Ferrars is right, a tenant who over a substantial period, as happened in the present case, overpaid, would be in the position of having occupied throughout the period in question rent free. I should myself have expected that, if Parliament had intended for the first time to impose so severe a penalty, it would have made the intention plain; and that could have been done quite simply by letting the subsection read "Where any payment has "been made in contravention of the foregoing subsection the whole

" amount of the rent shall be recoverable by the person," etc. It is not to be forgotten that there is, in fact, another penalty available against the landlord under section 9, for a landlord who has received excessive payment may be, as indeed the landlord in this case was, fined as for a criminal offence, and the amount of the fine may amount to no less than £100. To add this further penalty upon the landlord and to give to the tenant, as it seems to me, an unjustifiable advantage, is, I think, a somewhat extravagant conclusion.

The second ground which leads me to the conclusion which I have reached is based on a consideration of other relevant sections, both of this Act and of the Rent Act of 1920. So far as this Act is concerned, I have already mentioned section 9, which provides in the first subsection that a person who requires or receives any payment in contravention of section 4 shall be guilty of an offence, and later provides that, without prejudice to any other methods of recovery, the court by which he is found guilty may order the amount paid in contravention of the Act to be repaid. Mr. Borders relied on that to support his view of the construction; but for my part I do not think that section 9 carries the matter one way or another any further. The amount which the court may order to be paid is the payment made in contravention of section 4, and thereby you are thrown back on the construction of paragraph (*a*).

But some assistance, I think, is derived from the Rent Restriction Act of 1920. There four sections are relevant, sections 1 and 14, which must be read together, and sections 9 and 10, which must be read together. Sections 1 and 14 relate to increase of rent in respect of premises not being furnished houses, and one section provides for the excess rent charged being irrecoverable by the landlord, and the other for the correlative right of the tenant to recover excess rent paid. Section 1 states: " . . . where the rent of any dwelling-house to which this Act " applies . . . has been . . . increased, then, if the increased " rent . . . exceeds by more than the amount permitted under " this Act the standard rent . . . the amount of such excess " shall . . . be irrecoverable from the tenant." Section 14 provides the correlative right of the tenant. " Where any sum " has . . . been paid on account of any rent . . . being a sum " which is . . . irrecoverable by the landlord . . . the sum so " paid shall be recoverable from the landlord . . . by the tenant" who has been paid it. The formulae used in those two sections make it, I think, quite plain that what the tenant can get

C. A.
1954

HENRY
v.
TAYLOR.

Evershed M.R.

back from the landlord, if the tenant has overpaid, is not the full amount of the excessive rent but only so much of it as is in excess. Similarly, as regards sections 9 and 10. They concern furnished houses, and are therefore more in pari materia with the sections under review in this case. Section 9 is concerned with the civil rights of the parties and section 10 with the penalty. Section 9 provides: " Where . . . it is proved to the " satisfaction of the county court . . . that the rent charged is " yielding . . . a profit more than 25 per cent. in excess of the " normal profit . . . the court may order that the rent, so far as " it exceeds such sum as would yield such normal profit and 25 per " cent. shall be irrecoverable, and that the amount of any pay- " ment of rent in excess of such sum . . . shall be repaid to the " tenant." In section 10, where the rent charged yields a profit exceeding the normal profit by the stated percentage, or where the profit on any rent charged is extortionate, " then, without " prejudice to any other remedy . . . the landlord shall be liable " on summary conviction to a fine not exceeding £100, and the " court by which he is convicted may order that the rent so " far as it exceeds the amount permitted by the last preceding " section of this Act shall be irrecoverable and that the amount " of any such excess shall be repaid to the tenant." It is true, as Mr. de Ferrars observed, that in the section under review, section 4, the formulae have been altered, and it is his argument that they have been deliberately altered so as to create, for the first time, a right in the tenant to recover not merely the overplus but the whole rent paid including, but not limited to, the amount of the excess. If there had been intended such a change then I am inclined to think that Parliament would have taken the opportunity of stating it much more clearly. But what is to be noticed in reading the various sections is that Parliament in this somewhat complex legislation, which has covered a long period of years, has not been consistent in the formulae which it has chosen. The formulae in section 1 are not the same as the formulae in section 9, although the effect is substantially the same. But in section 9 the phrase is used " the amount of any " payment of rent in excess of such sum . . . shall be repaid." That is substantially the same formula as occurs in section 4 of the Act of 1946. True, in the former case it is used in a context which makes plain its limited significance, and it is not used in the same context here. But it does seem to me to show that the phrase " payment of rent in excess of " may equally mean either the total payment which is excessive or such amount of the total payment as constitutes the overplus. The draftsman of the Act of 1946 may well have had the old section 9 formula firmly in mind and introduced it into this statute; but, however that may be, I think that the earlier Act tends to show that the use of the language in 1946 should not be treated as intentionally and deliberately meaning that for which Mr. de Ferrars has contended.

Although the matter is short, since it is a question of construction it is not altogether easy to determine it without elaboration, which may be said only in the end to confuse. Really it is a question of reading the language used, of course, in its context, and arriving at a conclusion as to what is meant. As I have tried to show, I think for myself that what was meant in paragraph (*a*) of section 4 (1) by the phrase " payment of any sum in excess," was payment of such sum as constituted an overcharge to the extent that it was greater than the rent registered. That is, perhaps, only saying again the same thing in other words; but, to revert to the figures that were earlier chosen, it means here the 5s. and not the 25s. For these reasons I think that this appeal should be allowed.

DENNING L.J. Where there is a fair choice between a literal interpretation and a reasonable interpretation, we should always choose the reasonable interpretation. Applying that rule here, it seems to me plain that the amount which the tenant can recover is only the amount of the excess. He cannot recover back the proper rent. Even when a landlord stipulates for an excessive rent, the tenancy itself is not void. He is liable to a penalty to be imposed by the criminal courts; and, in addition, he has to repay the excess; but he does not suffer the additional penalty of forfeiting the proper rent. I agree that the appeal should be allowed.

MORRIS L.J. I am entirely of the same opinion and am in full agreement with the two judgments which have been delivered. If, for purposes of example, it is assumed that a sum of £1 is the rent entered on the register, then it seems to me that a reasonable reading of section 4 of the Act of 1946 would be that it shall not be lawful to receive on account of rent payment of any sum in excess of £1. While I agree that two constructions are possible, the construction which appeals to me is that if 25s. is received, then the sum of 5s. should be regarded as being the sum which is in excess of £1. It is postulated, on the facts that I have assumed, that £1 may be received. If then 25s. is received, I

C. A.
1954

HENRY
v.
TAYLOR.

should regard the payment in contravention, as being not the sum of 25s. but the sum of 5s. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *F. R. Earle; S. H. White.*

B. A. B.

C. A.
1954
Mar. 4.

Singleton, Jenkins and Hodson L.JJ.

KNIGHT AND ANOTHER v. OLIVE AND ANOTHER.

[Plaint No. J. 73.]

Landlord and Tenant—Rent restriction—Sublease—Sublease by tenant of paddock together with rooms in farm-house belonging to him—Rooms and paddock a "dwelling-house" within Rent Acts—Purchase of paddock by plaintiffs—Claim by plaintiffs for possession of paddock from tenant and subtenant—Termination of interest of tenant—Subtenant not protected under Acts against plaintiffs as landlords—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3).

Judgment — Extempore judgment — Followed by written judgment — County court.

O., the tenant of a paddock of less than 2 acres who was also the owner of a farm-house, let some of the rooms in the farm-house to T., and also sublet the paddock to him, the rooms and paddock constituting a dwelling-house to which the Rent Acts applied. In 1946 the plaintiffs bought the paddock and thus became O.'s landlords in respect of it. In 1951 one D. bought the farm-house from O. subject to the tenancy of the rooms to T., which in proceedings by D. for possession was held to be protected by the Rent Acts. In December, 1951, the plaintiffs gave notice to O. and T. to quit the paddock. O. did not resist the plaintiffs' claim to possession, but T. refused to comply with it, claiming that as O. had let him the rooms in the farm-house together with the paddock, and they together constituted a dwelling-house, he could claim, as against the plaintiffs, the protection of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, in regard to the paddock after the interest of his immediate landlord O. had been determined:—

Held, that O., being the tenant of a paddock with no building on it could not bring the paddock within the Rent Acts to the detriment of his landlord by subletting it with a rent-restricted dwelling-house held by him under a different title. The provisions of section 15 (3) of the Act of 1920 had no application, since O. could never have claimed the protection of the Acts in relation to the paddock, and it followed that on the determination of his interest in the paddock there was no protection in respect of it to which it was possible for his subtenant to succeed. The plaintiffs were therefore entitled to possession.

Cow v. *Casey* [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197 applied.

APPEAL from Judge Shove sitting at Sleaford County Court.

In 1942 the first defendant, Olive, was the tenant of a paddock belonging to one Midgeley, and he also owned a farm-house situated a few hundred yards from the paddock. He let certain rooms in the farm-house to the second defendant, Tyree, and also sublet the paddock to him. The rooms in the farm-house were within the protection of the Rent Restrictions Acts, and as the paddock consisted of less than two acres and was let together with the rooms, by virtue of the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), as between the first defendant and the second defendant the whole subject-matter of the letting, namely, the rooms and paddock, constituted a dwelling-house to which the Acts applied. In 1946, the plaintiffs, John Edwin Peter Knight and Robert Field Knight, bought the paddock from Midgeley, and thus became the landlords of the first defendant so far as the paddock was concerned. In 1951 one Dobney bought the farm-house from the first defendant subject to the tenancy of the rooms therein of the second defendant. In January, 1952, an apportionment was made of the rent payable to Dobney in respect of the rooms in the farm-house and to the plaintiffs in respect of the paddock, the respective apportionments being 6s. 5d. a week for the rooms and 7d. a week for the paddock. In February, 1952, Dobney gave notice to the second defendant to quit the rooms in the farm-house and on the expiration of that notice in March, 1953, Dobney took proceedings for possession. Those proceedings failed because the second defendant was protected by the Rent Acts in respect of his tenancy of the rooms. At that time the paddock was held by the first defendant on a yearly tenancy from the plaintiffs. On December 7, 1951, the plaintiffs gave notice, expiring on April 6, 1953, to both defendants to quit the paddock. The defendants having failed to comply with the notice, proceedings for possession were instituted against them in the Sleaford County Court on September 1, 1953.

The principal question raised was whether the second defendant could claim, as against the plaintiffs, the protection of the Rent Acts in respect of the paddock, even though the interest of the first defendant, as tenant of the paddock, had been determined. The first defendant did not resist the claim for possession of the paddock and judgment was given against him. The county court judge, however, held that the second defendant was a protected tenant by virtue of the provisions of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3 (1),[1] the Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (3), and the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3), and dismissed the plaintiffs' claim for possession. The plaintiffs appealed.

Lionel Jellinek for the plaintiffs. The county court judge was wrong in holding that the second defendant, Tyree, was entitled to the protection of the Rent Acts. Olive, the first defendant, was the tenant of the paddock, which was not controlled, and therefore could not sublet a controlled tenancy of the paddock as against his own landlords, the plaintiffs. When Olive let the paddock with the rooms in the farm-house which were his own property and were controlled under the Acts, as between Tyree and himself the two together constituted a dwelling-house by virtue of the provisions of section 3 (3) of the Act of 1939, and consequently as between Olive and himself Tyree was protected by the Acts. Olive, however, was not, and never had been, the tenant of a dwelling-house, but only of a paddock, and consequently Olive's tenancy, which was determined by the plaintiffs, was that of a paddock only. Tyree was tenant of the dwelling-house and subtenant of the paddock. *Cow* v. *Casey* [2] is authority for saying that a tenant of premises which are not protected by the Acts cannot create a subtenancy of part of those premises which will be protected against the head landlord. The county court judge was wrong in holding that as between Tyree and the plaintiffs the Rent Acts had any bearing on the letting of the paddock, since the plaintiffs had nothing to do with the dwelling-house. It follows that, if the Acts have no application, the second defendant cannot be entitled to the protection afforded by section 15 (3) of the Act of 1920, and the appeal should be allowed.

---

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15: "(3) Where the interest of a "tenant of a dwelling-house to which "this Act applies is determined either "as the result of an order or judgment "for possession or ejectment, or for "any other reason, any subtenant to "whom the premises or any part "thereof have been lawfully sublet "shall, subject to the provisions of "this Act, be deemed to become the "tenant of the landlord on the same "terms as he would have held from "the tenant if the tenancy had continued."

Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3: "(1) No order or judgment for the "recovery of possession of any dwelling-house to which the principal "Acts apply or for the ejectment of a "tenant therefrom shall be made or "given unless the court considers it "reasonable to make such an order "or give such a judgment, and either "(*a*) the court has power so to do "under the provisions set out in the "First Schedule to this Act; or (*b*) "the court is satisfied that suitable "alternative accommodation is available for the tenant or will be "available for him when the order "or judgment takes effect."

Rent and Mortgage Interest Restrictions Act, 1939, s. 3: "(3) Subject "to the provisions of paragraph (*a*) "of the last preceding subsection, the "application of the principal Acts, "by virtue of this section, to any "dwelling-house shall not be excluded "by reason only that part of the "premises is used as a shop or office "or for business, trade or professional "purposes; and for the purposes of "the Rent and Mortgage Interest Restrictions Acts, 1920 to 1938, as "amended by virtue of this section, "any land or premises let together "with a dwelling-house shall, unless "the land or premises so let consists "or consist of agricultural land exceeding two acres in extent, be "treated as part of the dwelling-house; but, save as aforesaid, the "principal Acts shall not, by virtue of "this section, apply to any dwelling-house let together with land other "than the site of the dwelling-house."

The second defendant, in person, submitted that the judgment of the county court judge was right for the reasons given therein.

SINGLETON L.J. I will ask Jenkins L.J. to give the first judgment.

JENKINS L.J. This is an appeal by the plaintiffs, John Edwin Peter Knight and Robert Field Knight, from a judgment of Judge Shove delivered at Sleaford County Court on December 1, 1953, dismissing, as against the second defendant, a claim for possession of a certain paddock of which the plaintiffs were the owners, the first defendant was the tenant, and the second defendant the subtenant holding under the first defendant.

[His Lordship stated the facts and read the material sections of the Rent Acts and continued:] The question, in effect, was whether, in view of the fact that, as between the first defendant and the second defendant the former had let to the latter the rooms in the farm-house together with the paddock, the second defendant could claim as against the plaintiffs the protection of the Rent Acts in respect of the paddock even though the interest of the first defendant as tenant of the paddock had been determined.

The first defendant did not resist, nor could he have resisted, the claim for possession of the paddock. As a result of the notice to quit and issue of proceedings for possession, his interest was clearly determined, and the county court judge found no difficulty in giving judgment against him. As regards the second defendant, the position was different in the view of the county court judge, who held him to be a protected tenant by virtue of the sections to which I have referred. The plaintiffs' claim for possession was, accordingly, dismissed as against the second defendant, and the present appeal has resulted.

---

[2] [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197.

It seems that the county court judge gave an extempore judgment with which he was not satisfied, as is quite understandable in view of the complicated nature of the case, and therefore took time to consider the matter, and delivered a written judgment at a later date.

Two points appear to have been argued before him, one of which was as to the effect of the provisions of the Law of Property Act, 1925, in relation to the severance of a reversion. I need not refer again to that argument, which was rejected by the county court judge, and was not opened or pursued before us.

The second argument, which proved to be the effective one on which the case turned, was that, in the circumstances, the second defendant could claim as against the plaintiffs the benefit of the Rent Acts in respect of the paddock.

The portion of the county court judge's written judgment dealing with this point is in these terms: " A further point was " taken on behalf of the plaintiffs. It was suggested that after " the service of the notice to quit the rooms they were no longer " let and consequently could not be let together with anything " else. I did not accede to that proposition. If it were sound, " it would apply to every case of a protected tenancy that comes " before a court, for in none of such cases could the premises be " said to be let as a separate dwelling. A tenant of protected " premises is entitled after a notice to quit to remain in possession " on terms the same as those upon which he held under his " contractual tenancy. Likewise, a subtenant, after the determination of the head tenant's interests, holds of the head " landlord on the same terms as he would have held of the head " tenant if the tenancy had continued. If, therefore, the rooms " and the paddock were still let together after the severance of " the reversion, Tyree was entitled to continue in possession of " them on the same terms after the notice to quit the rooms and " after the determination of Olive's interest in the paddock. " In my opinion, Tyree was entitled to the protection of the " Rent Restriction Acts in respect of the paddock, and since the

C. A.

1954

KNIGHT
v.
OLIVE.

Jenkins L.J.

" plaintiffs did not put forward with regard to it any ground " upon which an order for possession could be made, I considered " that the action must fail. I am aware that the late Judge " Gamon in a case which came before him expressed an opinion " contrary to that which I formed, but he found in favour of the " tenant on another point. For the reasons which I have given " I felt, with all respect to his memory, unable to take the same " view as he did."

To that I should add this passage from the shorthand note of the county court judge's extempore judgment: " I do not think " that the subsequent giving up of possession or submitting to " judgment in respect of the field by Olive really affects the " position, because the present plaintiffs must be in the same " position as Olive was in if the premises are within the Rent " Restrictions Act. If they are within the Rent Restrictions Act, " then the present plaintiffs step in the shoes of Olive, and Tyree " holds it on the same conditions as he held from Olive."

With respect to the county court judge, I find myself unable to accept his conclusion. There is no doubt, as I have said before, that, as between the first defendant, the owner of the farm-house and tenant of the paddock, and the second defendant, the rooms in the farm-house, together with the paddock, constituted a dwelling-house to which the Rent Restrictions Acts applied. Therefore, so long as the first defendant's interest in both rooms and paddock continued, there was no doubt that the second defendant was entitled as against the first defendant to the protection of the Acts in respect of both. But, in my judgment, when the first defendant had sold the farm-house to Dobney, and had therefore got rid of his interest in the rooms, it was hardly possible to say that the rooms in the farm-house and the paddock were still let together within the meaning of the Acts. The farm-house was held by the second defendant under a contractual tenancy from Dobney, which became a statutory tenancy when the notice to quit expired. The paddock was held by the second defendant until the first defendant was ejected, under a contractual subtenancy from the first defendant. That, however, may perhaps be no more than a way of putting the argument under the Law of Property Act, 1925, which was not relied on before us. The decisive point, in my judgment, is that the first defendant's landlords, the plaintiffs, had not, and had never had, any interest whatever in the farm-house. It was nothing to do with them. The only tenancy, so far as they were concerned, was

Olive's tenancy of the paddock, subject to which they had purchased the paddock. That was a tenancy wholly outside the provisions of the Rent Acts, because no dwelling-house entered into the case at all; it was simply a letting of a paddock. In my view, it would be contrary to all principle to hold that where a landlord lets to a tenant a field or a paddock with no dwelling-house connected with it, the tenant can, by letting that paddock together with a dwelling-house of his own, turn the tenancy under which he holds the paddock into a tenancy to which the Rent Acts apply.

Authority for my view on that point is to be found in *Cow* v. *Casey*,[1] a decision of this court. In that case the headnote reads: " A company, the yearly tenants of a dwelling-house which was " outside the scope of the Rent Restriction Acts, had sublet a " part of the premises, of such a rateable value as to lie within the " Acts, to the defendant on a weekly tenancy. The company's " tenancy could only be determined by six months' notice expiring " on September 29 in any year. The landlord gave to the " company six months' notice to quit expiring on June 24, 1948. " The company accepted that notice and on that date gave up " possession of the demised premises with the exception of the " part sublet to the defendant. The company on June 14, 1948, " had given the defendant notice to quit expiring on June 26. " The defendant having refused to deliver possession of the " part of the premises sublet to him, the landlord by specially " endorsed writ under Order 14, claimed possession. The defen" dant sought leave to defend the action on the ground that if " on June 24 the head lease was determined, he then became, " for the remaining two days of his weekly tenancy, a direct " tenant of the plaintiff, the head landlord, of premises within " the scope of the Rent Restriction Acts. Pritchard J. gave " the landlord leave to sign final judgment for possession. The " defendant appealed:—*Held*, dismissing the appeal, that the " dwelling-house, the subject of the original demise, not being " a dwelling-house to which the Rent Restriction Acts applied, " section 3 of the Rent and Mortgage Interest Restrictions " (Amendment) Act, 1933, did not apply to the subtenancy of a " part of the premises so as to protect a subtenant from eject" ment. On the determination of his subtenancy the defendant " became at common law a trespasser. Section 15 (3) of the " Increase of Rent and Mortgage Interest (Restrictions) Act,

---

[1] [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197.

"1920, under which (where the interest of a tenant of a dwelling-house to which the Act applied was determined) any subtenant "to whom any part of the premises had been lawfully sublet was "to be deemed to have become the tenant of the head landlord, "only applied to the case where the head tenant, whose tenancy "had been determined, was tenant of a dwelling-house to which "the Acts applied. The defendant accordingly was not entitled "to the protection of the Rent Restriction Acts."

That case thus raised in a somewhat different form the question involved in the present case. The property let by the head landlord seeking possession was not a dwelling-house to which the Acts applied. The immediate tenant having sublet a part of that property in such circumstances as to make the Act apply to that letting as between the tenant in occupation and his immediate landlord, and the subtenant having claimed the protection of the Acts as against the superior landlord, it was held that a tenant of premises outside the protection of the Acts could not bring them within the protection of the Acts so as to bind his landlord by subletting a part of the premises which, taken by itself, was of such a rateable value as to be within the protection of the Acts.

Lord Greene M.R. in that case said[2]: "The appellant "argues that the effect of his subtenancy was this, that on the "surrender of the head lease he became in direct relations with "the plaintiffs as head lessor. He became accordingly, according "to the argument, on June 24 a tenant of the plaintiff in "occupation with two days of his contractual tenancy to run. "That, he says, entitled him to claim against the plaintiff the "protection of the Rent Restriction Acts, his flat being, as I "have said, one which was clearly within the scope of the Acts. "In my opinion, that argument is completely misconceived. At "common law it is perfectly true he had two days' occupation "which he was entitled to keep as against the superior landlord. "On the expiration of those two days, at common law he became "a trespasser. The notice which had been served on him expired "at the end of those two days. He therefore became at common "law a trespasser. What possible ground is there for his claiming "the protection of the Rent Restriction Acts? The appellant "says that section 3 (1) of the Act of 1933 protects him. . . . "'Now,' says Mr. Blundell, 'this is a dwelling-house to which "'the principal Acts apply. What is being sought against me is

---

[2] [1949] 1 K.B. 474, 478.

1954

KNIGHT
v.
OLIVE.

Jenkins L.J.

"'an order or judgment for the recovery of possession of that "'dwelling-house. Therefore, I am entitled to say it is not open "'to the court to make such an order by virtue of this section.' "That appears to me to be a complete misconception of the true "position. It is quite true what is being asked for in this action "is recovery of possession as part of the dwelling-house 'Carfax' "which was demised by the plaintiff. That dwelling-house "'Carfax' is not a dwelling-house to which the principal Acts "apply. It is a mere accident that only part of that dwelling-"house happens to be occupied, the reason being that the tenant "of the rest has moved out. Test the matter in this way. "Suppose the head tenant had surrendered by deed, and after-"wards said: 'Well, I am not going to move out,' and an action "had to be brought to eject him. That would have been an "action against a head tenant and his subtenant, both as defen-"dants, for the recovery of possession of the house 'Carfax,' "which is not a dwelling-house to which the principal Act "applies. In that case section 3 of the Act would have had "nothing in the world to do with the case. It cannot possibly "make any difference that the head tenant does not happen to "be a necessary defendant because he has himself vacated the "house. What the plaintiff is trying to do is to get possession "of his house 'Carfax,' and sitting in a corner of it is a person "who, at common law, is a pure trespasser. It seems to me "impossible to suggest in those circumstances that section 3 "applies."

Then the Master of the Rolls went on to say: "I am not sure "whether reliance is placed on section 15 (3) of the Act of 1920 "which does deal with the case of subtenancies, but, in my "opinion, it is impossible to rely on that section. It deals with "the case of a tenant, whom I will call the head tenant, whose "tenancy is determined either as the result of an order or "judgment for possession or ejectment, or for any other reason. "It would cover, therefore, quite clearly the case where the head "tenancy is determined by a surrender. But the subsection is "limited to a case where the tenant whose tenancy is determined, "that is to say, the head tenant, is tenant of a dwelling-house "to which the Act applies. I should have thought that is clearly "what the Act means. The company was not a tenant of a "dwelling-house to which the Act applies; it was tenant of "a dwelling-house to which the Act did not apply, and the fact "that they had granted a subtenancy of this flat could not alter "that circumstance."

It seems to me that the present is an a fortiori case. In *Cow* v. *Casey*[3] the whole of the premises in question were demised by one landlord to one tenant, and the question was whether a holding protected by the Rent Acts could be carved out of the entire premises. In the present case the question is whether a tenant of a mere paddock, a piece of land with no building upon it whatever, can bring that paddock, or piece of open land, within the protection of the Rent Acts to the detriment of his landlord by the expedient of letting it along with a rent-restricted dwelling-house held under an entirely different title with which his landlords in respect of the paddock had nothing whatever to do. In my judgment, it is plain that this question must be answered in the negative.

Lord Greene M.R., in *Cow* v. *Casey*,[4] referred to section 15 (3), and pointed out that this subsection did not protect the occupying tenant in the circumstances of that case. In my judgment, it is equally plain that this subsection cannot avail the second defendant, in the present case. Section 15 (3) provides: "Where the interest of a tenant of a dwelling-house to which this "Act applies is determined, either as the result of an order or "judgment for possession or ejectment, or for any other reason, "any subtenant to whom the premises or any part thereof have "been lawfully sublet shall, subject to the provisions of this Act, "be deemed to become the tenant of the landlord on the same "terms as he would have held from the tenant if the tenancy had "continued."

To relate the provisions of that subsection to the present case, one must take the tenant to have been the first defendant. But he was not the tenant of a dwelling-house, and never had been; he was a tenant of a paddock and had at one time been the owner of a farm-house. Therefore, the provisions of section 15 (3) can have no application. The first defendant could never have claimed the benefit of the Rent Acts in respect of the paddock, and it follows that on the determination of his interest there was no protection in respect of the paddock to which it was possible for the second defendant to succeed.

The case is, on its facts, a complicated one, and cases in which the Rent Acts are concerned are seldom, if ever, free from difficulty; but giving the matter the best consideration I can, and for the reasons which I have endeavoured to express, I am of opinion that the county court judge was in error in holding that the second defendant was entitled to the protection of the Acts

[3] [1949] 1 K.B. 474.

[4] Ibid. 480.

C. A.
1954
KNIGHT
v.
OLIVE.

in respect of this paddock, and, accordingly, the appeal should be allowed and judgment for possession should be entered against the second defendant.

HODSON L.J. I agree.

SINGLETON L.J. I agree.

Appeal allowed; order for possession.

Solicitors: *Cunliffe & Airy for Ernest H. Godson & Co., Sleaford, Lincs.*

P. B. D.

C. A.
1954
Mar. 11.
Singleton, Jenkins and Hodson L.JJ.

LAMBERT v. VE-RI-BEST MANUFACTURING CO. LD.

Landlord and Tenant—Act of 1927*—Goodwill—Compensation—New five year lease granted to tenant in lieu of compensation—Landlord given power to determine new lease and tenant leave to apply to court in future for compensation for unexpired residue of term—Jurisdiction of county court judge to order compensation in terms borrowed from subsection of Act not directly applicable to present facts—Landlord and Tenant Act,* 1927 (17 & 18 *Geo.* 5, *c.* 36), *ss.* 4, 5 (1), (2) *and* (5).

On an application by a tenant under the Landlord and Tenant Act, 1927, for a new lease in lieu of compensation on the expiration of her existing lease, the county court judge granted her a new lease of five years only. At the same time the judge granted an application by the landlords that the new lease should include a clause allowing them to determine the tenancy upon notice in certain events; but he inserted in the draft clause submitted for his approval a term, based on the words of section 5 (5) of the Act of 1927, that if the tenancy were so determined, the tenant should be entitled to come back to the court and ask for compensation for the unexpired residue of the lease. On appeal by the landlords:—

Held, (1) that the provision for compensation to be assessed at a future date was a proper term of the new lease in the circumstances of the case, and was well within the court's jurisdiction under section 5 (2) to grant a new lease "on such terms as the "tribunal may determine to be proper"; and (2) that although the special circumstances set out in section 5 (5) did not arise in the present case, the judge was entitled to adapt the procedure laid down for compensation in that subsection to the present similar circumstances in order to do justice between the parties.

Order of Judge Dale affirmed.

APPEAL from Judge Dale sitting at Westminster County Court.

C. A.
1954

LAMBERT
v.
VE-RI-BEST
MANUFACTURING
CO. LD.

Mrs. Rubina Elizabeth Margaret Lambert, a restaurant proprietor, was the holder of the residue of a term of eight years running from March 25, 1945, to March 25, 1953, under a lease of March 18, 1946, granted by the Commissioners of Crown Lands to her predecessors in title, of premises at 105, New Oxford Street, London W.1. Clause 3 (2) of that lease provided: " That the " term hereby granted may be determined by the lessor on any " one of the quarter days hereinbefore mentioned on the lessor " giving to the lessees at least six months' previous notice in " writing in that behalf if the lessor shall require the demised " premises or any part thereof for or in connexion with the " carrying out of any scheme of improvement development or " rebuilding in connexion with any neighbouring property of " the Crown."

On March 16, 1951, before the expiry of the eight-year term, the Commissioners of Crown Lands granted to the present appellants, the Ve-Ri-Best Manufacturing Co. Ld., a 99-year building lease in respect of a large block of property bounded by New Oxford Street, St. Giles High Street, and Lawrence Place, and embracing 105, New Oxford Street. By clause 7 of that lease it was provided that: " Within two years of obtaining possession " of all the old buildings and in any event not later than March 25, " 1986, the lessees shall proceed with the demolition of the old " buildings in accordance with the provisions of clause 4 (3) of " the building agreement and remove and clear away all such " buildings and the material thereof and shall clear out and solidly " fill in with concrete all cesspools and drains in or upon the said " premises."

On June 15, 1951, Mrs. Lambert served on the Commissioners of Crown Lands and the Ve-Ri-Best Manufacturing Co. Ld. her immediate landlords, notice of application for a new lease as follows: " (1) That I allege that the sum which could be awarded " to me under section 4 of the Landlord and Tenant Act, 1927,[1]

---

[1] Landlord and Tenant Act, 1927, s. 4: " (1) The tenant of a holding " to which this Part of this Act " applies shall . . . be entitled, at the " termination of the tenancy on quitting the holding, to be paid by his " landlord compensation for goodwill " if he proves to the satisfaction of " the tribunal that by reason of the " carrying on by him or his predecessors in title at the premises of a " trade or business for a period of not " less than five years goodwill has " become attached to the premises by " reason whereof the premises could " be let at a higher rent than they " would have realized had no such " goodwill attached thereto:"

S. 5: " (1) Where the tenant " alleges that, though he would be " entitled to compensation under the " last foregoing section, the sum " which could be awarded to him " under that section would not compensate him for the loss of goodwill " he will suffer if he removes to and "for compensation for the loss of goodwill attaching to the said "leasehold premises at 105, New Oxford Street, aforesaid, of "which I am the tenant and at which I carry on the trade or "business of a licensed restaurant would not compensate me for "the loss of goodwill which I shall suffer if I remove to and "carry on my trade or business in other premises; and further "(2) that in lieu of such compensation I require a new lease of "the said premises to be granted to me."

By that notice Mrs. Lambert purported to show that she was, or would have been, entitled to compensation under section 4 of the Act and that the compensation which she could have obtained would not be sufficient to do justice between the parties, having regard to what had been done to improve the goodwill of the premises generally. Her claim arose under section 5 of the Act, and the notice was followed by an application to the Westminster County Court on June 19, 1952. The landlords, the Ve-Ri-Best Manufacturing Co. Ld., by their answer delivered on August 22, 1952, stated that they "do not admit that the applicant would "be entitled to compensation under section 4 of the above-recited "Act as alleged or at all. It is not admitted that any goodwill "has become attached to the said premises within the meaning "of the said Act. If (which is not admitted) any such goodwill

"carries on his trade or business in "other premises, he may in lieu of "claiming such compensation, at any "time within the period allowed for "making a claim under the said "section, serve on the landlord notice "requiring a new lease of the "premises at which the trade or "business is carried on to be granted "to him."

"(2) Where such a notice is so "served, the tribunal, on application "being made for the purpose either "by the landlord or by the tenant not "less than nine months before the "termination of the tenancy, or, "where the tenancy is terminated by "notice, within two months after the "service of the notice, may, if it "considers that the grant of a new "tenancy is in all the circumstances "reasonable, order the grant of a new "tenancy for such period (being a "term of years absolute) not exceeding fourteen years and on such "terms as the tribunal may determine to be proper, but if the "tribunal is precluded on any of the "grounds mentioned in paragraph (*b*) "of the following subsection from "making such an order the tribunal "may award such compensation as is "provided under the last foregoing "section: . . .

"(5) Every lease granted under this "section shall, if the landlord so "requires, be subject to a condition "that if at any time after the expiration of seven years from the commencement of the term thereof the "premises are required for the purpose of carrying out a scheme of "redevelopment, the landlord, on "satisfying the tribunal that the "premises are so required, and on "giving not less than twelve months' "notice in writing to the tenant, may "determine the lease and resume "possession of the premises upon "payment of such compensation as "the tribunal may determine to be "the value of the unexpired residue "of the term of the lease."

"has become attached to the said premises, the said premises "cannot by reason thereof be let at a higher rent than they would "otherwise realize. . . . Vacant possession of the premises is or "alternatively will shortly be required by the respondents in "order to carry out a scheme of redevelopment pursuant to their "obligations in that behalf contained in the ground lease made "on March 16, 1951, between the Commissioners of Crown Lands "and the respondents" (a reference to clause 3 (2) above).

The case was referred, according to the practice under the Act, to a referee who reported to the county court judge generally on the matter. The application was heard before Judge Dale at the Westminster County Court on May 13, 1953; and on May 23, the judge made a note of his order as follows: "Order new lease "five years, twelve months' notice, rent £475. . . . Clause 3 (2) "redrafted based on words of section 5 (5) of Act. Counsel to "agree draft order. Report adopted with amendments."

Counsel then set about drafting a clause in the form suggested, and an order was drawn up dated May 13, 1953, as follows: "It "is ordered that a new tenancy of the holding situate at and "known as 105, New Oxford Street, London W.1, mentioned in "the said notice be granted to the applicant for the term of five "years from March 25, 1953, at the yearly rent of £475, and "subject to the conditions and stipulations set forth in the draft "lease to be agreed between the parties and to be annexed "thereto." There was then a provision as to costs, and the further provision: "And either party is to be at liberty to apply "to the court as he may be advised."

Clause 3 (2) in the lease, as settled by counsel, read as follows: "That if at any time during the term hereby granted the demised "premises or any part thereof are required by the lessor for or in "connexion with the carrying out of any scheme of improvement "development or rebuilding in connexion with any neighbouring "property of the lessor (the lessor) on satisfying the court that "the premises are so required and on giving not less than "twelve months' notice in writing to the lessee to expire on any "one of the quarter days hereinbefore mentioned may determine "the term hereby granted and resume possession of the demised "premises on payment of such compensation as the court may "determine to be the value of the unexpired residue of the term "hereby granted. For the purpose of this subclause the court "means the Westminster County Court."

The landlords appealed, submitting that it was not within the power of the county court judge under section 5 of the Landlord and Tenant Act, 1927, to include the provision for compensation appearing in that clause of the lease, and that he had no power to order the fixing of the amount of compensation at some future time.

Claude Duveen Q.C. and *A. L. Figgis* for the landlords. The county court judge had no jurisdiction to insert in the draft lease the term that the tenant should be entitled to come to the court and ask for compensation if the landlords determined the lease in the circumstances set out in that clause; and, further, there was no evidence in the present case to justify its inclusion. The most the judge could have done was to fix specific amounts for compensation to be paid if the lease were determined within one year, two years, and so on. No power is conferred on him to provide for compensation except in the special circumstances set out in subsection (5) of section 5 of the Act of 1927, which do not apply in the present case. Further, it is submitted that "liberty "to apply," included in the judge's order, is simply liberty to apply for the purpose of working out that order. It does not give the tenant a right to come back at a future date to ask for compensation. Once the order is drawn up and executed, the "liberty to apply" ceases to be effective.

[JENKINS L.J. Even if the lease, which is annexed to the order, might necessitate a further application?]

Such an application would be under the lease and not under the "liberty to apply." Technically, the judge would have to order new proceedings. If, for instance, there were a new landlord by assignment, he could not apply for possession under the "liberty to apply," for he would not have been a party to the original action.

[SINGLETON L.J. The new landlord would succeed to the rights of the earlier landlords, including their "liberty to apply" under the order.]

D. J. C. Ackner for the tenant. The judge had jurisdiction to insert the particular term, and it was reasonable and within the powers given by section 5 (2): see *per* Maugham L.J. in *Whiteman Smith Motor Co. Ld.* v. *Chaplin*,[2] showing that in granting a new lease under section 5 (2) of the Act of 1927 the judge has a wide discretion and can do so on such terms as he may think proper. That is the only limit placed on his power. In *Rose* v. *Hurst*[3] Lord Greene M.R. said: "The Landlord and

---

[2] [1934] 2 K.B. 35, 55; 50 T.L.R. 301.

[3] [1949] 2 K.B. 372, 377; [1949] 2 All E.R. 24.

"Tenant Act, 1927, leaves it to the tribunal to decide what the "proper terms of a tenancy should be in rent, duration and other "terms. On the face of the statute, the power of the tribunal "to fix those various matters is only limited by express words "used in relevant parts of the Act." This term was a proper term in the circumstances of the case.

If the new lease had been for more than seven years, there could have been no dispute that this term would have been a proper term within the provisions of section 5 (5); a fortiori when the term granted was only five years. The tenant here has obtained the new lease in lieu of compensation for goodwill, and once she has been granted that lease she loses for ever her right to the compensation money. It must follow as a matter of ordinary logic and justice that if that five-year lease is cut down the tenant should receive some financial compensation for the unexpired residue. Subsection (5) of section 5 does not apply specifically to this case. It is a subsection which gives the tenant seven years certain and gives the landlord a specific right to demand a clause enabling him to determine the lease. Here the judge granted the landlords the right to determine within the five years on condition that they paid the tenant, not compensation in general terms, but compensation for the value of the unexpired residue. In the circumstances the landlords have received from the court more than they were entitled to demand. A term providing that the judge should fix the compensation on a sliding scale would not have been a proper term, for such amounts would have had to be assessed on the assumption that all the main factors for consideration would remain as they are now, whereas in fact it is possible that at the date when the lease is determined the unexpired residue may have become valueless. Equity demands that the decision as to what compensation is to be paid shall be made at the actual date when it is to be decided; otherwise the judge would have to guess. The judge was not functus officio as soon as he had granted the new lease, any more than he would be functus officio in the circumstances of a case under section 5 (5).

Duveen Q.C. replied.

SINGLETON L.J. stated the facts, read the relevant clauses of the leases set out above, and the relevant sections of the Landlord and Tenant Act, 1927, and continued: There is an obligation on the Ve-Ri-Best Manufacturing Co. Ld. to undertake demolition and rebuilding of the large block of property of which they have a long lease, an obligation which should be fulfilled by them at any rate by March 25, 1986, although, no doubt, some part will be carried out by a very much earlier date.

It will be seen from that portion of section 5 (2) which I have read that if a notice under subsection (1) is served, the tribunal, in this case the county court judge, may, if he considers that the grant of a new tenancy is in all the circumstances reasonable, order the grant of a new tenancy. It is important to notice that the grant of a new tenancy is in lieu of compensation.

The county court judge considered that the grant of a new lease was in all the circumstances reasonable, and he so ordered. As he did that, it was open to him under the terms of the subsection to do it " on such terms as the tribunal may determine " to be proper," and it is on those words that the question before this court arises.

The requirement for rebuilding has not arisen as yet; no scheme has been proposed, and, so far as I understand it, no requisite permission has been given. No. 105, New Oxford Street is part of a large area, or a large number of premises, which the landlords have acquired, and there is nothing to show that there is any immediate haste that they should have possession of the premises. They are certainly not required at this moment for demolition or rebuilding.

There were several questions which arose before the county court judge. One was whether a case was made out which entitled the judge to make an order under section 5 (2), or not; in other words, whether it was shown that rights had accrued which could not adequately be met by compensation. I do not think that that was seriously challenged on the hearing, having regard to the findings of the referee. The question then arose, if there was to be the grant of a new lease, for what term it should be? The referee had reported that it ought to be a seven-year term, but when the correspondence between the parties was examined the judge came to the conclusion that they had rather decided the matter for themselves; he thought that a five-year term was the measure of their agreement, and that, consequently, the new lease ought to be for a five-year term.

Clause 3 (2) of the original lease under which Mrs. Lambert held enabled the term granted to her predecessors to be determined. [His Lordship read the clause and continued:] There thus arose for the consideration of the judge the question whether there should be a term something like that, or whether the new lease should be for a term of five years out-and-out. After hearing argument the judge thought that it was right, in the circumstances, that the landlords should have the right to determine the lease if the premises were really required for the purpose of rebuilding; there was a question about the form in which the clause should be drafted, and this is a short note of the order made on May 23: " Order new lease five years, twelve months' " notice, rent £475." The rent suggested by the referee in his report was £500 if there was to be a seven-year lease. When the county court judge came to the conclusion that the lease should be for five years only, he reduced the rent from £500 to £475. The note continues: " Clause 3 (2) redrafted," meaning thereby " to be redrafted," " based on words of section 5 (5) of " Act. Counsel to agree draft order. Report adopted with " amendments."

Following on that, counsel set about drafting a clause in the suggested form, and an order dated May 13, 1953, was drawn up—although we were told that it was not drawn up until later—in these terms: " It is ordered that a new tenancy of the holding " situate at and known as 105, New Oxford Street, London W.1, " mentioned in the said notice be granted to the applicant for the " term of 5 years from March 25, 1953, at the yearly rent of £475 " and subject to the conditions and stipulations set forth in the " draft lease to be agreed between the parties and to be annexed " thereto." There follows a provision as to costs, and this further provision: " And either party is to be at liberty to apply " to the court as he may be advised."

I draw attention to the fact that the note of the judge contained these words: " Clause 3 (2) redrafted based on words " of section 5 (5) of the Act." The county court judge's attention was called to section 5 (5) of the Act because of the desire of the landlords that there should be included in the lease a term that they should have the right to bring the lease to an end, in certain eventualities. It had been pointed out to the judge that under the old lease the tenant could be given six months' notice. The judge did not think, in view of what had happened, that six months' notice was reasonable in respect of the new lease, but he thought that the landlords ought to be able to put an end to the lease in certain circumstances on giving 12 months' notice. The landlords wanted to have such a clause in the lease. The judge said that the terms of the clause should be settled by counsel. It is on this that the dispute arises. Clause 3 (2) in the lease, as settled by counsel, reads as follows: " That if at any time during the term hereby granted "the demised premises or any part thereof are required by the "lessor for or in connexion with the carrying out of any scheme "of improvement development or rebuilding in connexion with "any neighbouring property of the lessor (the lessor) on satisfying the court that the premises are so required and on "giving not less than twelve months' notice in writing to the "lessee to expire on any one of the quarter days hereinbefore "mentioned may determine the term hereby granted and resume "possession of the demised premises upon payment of such "compensation as the court may determine to be the value of "the unexpired residue of the term hereby granted. For the "purpose of this subclause the court means the Westminster "County Court."

The result is that the county court judge has determined that in the new lease there shall be a clause which will enable the landlords to determine the lease in certain events—but if they do so, it is obvious that the tenant will lose something of the value of the new lease granted to her in lieu of compensation under section 4.

It is submitted by Mr. Duveen, on behalf of the landlords, that the order of the county court judge is bad, and that the provision as to compensation ought not to appear in the lease; and he asks that it should be struck out of the lease altogether. His submission is that there is no power in the judge to order the fixing of the amount of compensation at some future time. In a proper case compensation may be ordered under section 4 of the Act. If there is an application under section 5 for a new lease, compensation is not payable, prima facie; and Mr. Duveen submits to this court that the order that compensation, in the event of determination of the lease, should be ascertained at some future time, is not within the power of the county court judge. I think that I am right in saying that Mr. Duveen asked this court to say that the order should stand, subject to the striking out of the provision as to compensation.

Let me make this clear: the judge need not have ordered that the landlords should have the right to determine the lease during the five-year period. He was asked to do that by them. He agreed that there should be inserted a clause in the form which I have read, and it is submitted by Mr. Ackner that, in so doing, the judge was granting a new lease on such terms as he, the tribunal under the Act, determined to be proper. The note of the judge refers to section 5 (5) of the Act; the words are "based on "the wording of section 5 (5)." That does not mean that the case is covered by section 5 (5); no one suggests that it is; but there are words in it which the county court judge thought he could apply in the circumstances of this case if he felt disposed to enable the landlords to determine the lease during the five-year period.

[His Lordship read section 5 (5) and continued:] Section 5 (5) deals with the cases of leases over an extended period. Thus where there is a lease which must extend over more years than seven (because the question only arises after the expiration of seven years), then when the lease is determined and the landlord is allowed to resume possession, he does so on payment of such compensation as the tribunal determines to be the value of the unexpired residue of the term of the lease. That section does not apply to this case, but the principle of it, or the wording of it, was adopted by the judge in order to cover the position which arose, as he, the judge, had agreed to insert in the lease, at the request of the landlords, a power in the landlords to determine the lease.

It is said by Mr. Duveen that the power to fix compensation at a later date, which is given by section 5 (5), is peculiar to that subsection and does not arise anywhere else. That is quite right. It is said by Mr. Ackner that the very fact that it is in subsection (5) and is applied at the option of the landlord shows at least that it is a reasonable term, and that all the judge was doing in applying it to another case was inserting a reasonable term.

For a considerable part of the argument I was impressed by this consideration: if a landlord wishes to give notice to terminate a lease, and he has the power to do so, and his desire to do it is in order to fulfil his obligations under a building lease, he ought to know what it is going to cost him; otherwise he may find himself faced with a very heavy liability afterwards. Mr. Duveen agreed, in reply to a question from the court, that the county court judge might have said: "I give you leave to determine the "lease if the premises are required for building purposes, on "condition that if the lease is determined at the end of the second "year you shall pay £500, and if at the end of the third year "£250, or some such figure." That, said Mr. Duveen, would have been all right; but there is no power, he said, to postpone the assessment of compensation in the manner provided by section 5 (5), in any but a case under that subsection. Mr. Ackner was not prepared to agree that the judge could do that which Mr. Duveen said he could. If he could do it, how could he arrive at the compensation payable in advance without knowing in which year the option to give notice to determine the tenancy was going to be exercised? That does present a difficulty. It is one which makes me feel that the assessment of compensation ought not to be made in advance without knowing the time at which the right to compensation will arise. If one has to assess in the year 1953 the compensation for a possible determination of the lease at any time during the next five years one cannot do more than guess. Thus it seems to me that the county court judge, in making the order in the form in which he did, was getting as near justice as it is possible to get in a case of this kind. The desire to have the right to terminate was the desire of the landlords. The judge was entitled to grant a new lease on such terms as he determined to be proper, and he thought that the terms he stated were proper. I do not think that this court ought to decide that the judge had no such power. It seems to me to be obvious that it is the sort of power which ought to be given to a judge in such circumstances, and I should hesitate a long time before saying that he had no such power, when that which he has done seems to me to meet the justice of the case. The judge decided that there should be the right to determine the lease, and that if it was determined the parties should come back to him.

There is another way in which this case can be regarded, and in which I think it ought to be regarded. There had been a long consideration by the referee, and there was argument and discussion before the county court judge. If the judge had said to counsel for the landlords: "I am disposed to put in a clause "enabling you to determine the lease during the five-year period, "but I must protect the tenant in some way; I do not know "when you may think it desirable to determine the lease, or when "you will be able to satisfy me that you are going to rebuild "speedily, but suppose it is done in this way, that I give you the "right to terminate the lease on notice, but I reserve until a later "date the question of compensation," I feel sure that counsel would have said: "That seems to be a very reasonable way of "dealing with it." Otherwise the judge could have said: "Unless "something of that kind is done, I do not propose to insert a clause "giving you leave to determine the tenancy during the five-year "period; I do not know at this date how I can do justice between "the parties without some such provision." Or the judge might have thought that the rent should be reduced further. If he had thought that the new lease might well not last for as long as five years, he might have said that the rent should be, perhaps, half the amount; or if he had thought that it might only last one year, he might have said in the circumstances that the tenant should have the premises for a very small rent for the one year; but he concluded that he would do that which the landlords wished him to do, namely, that they should be able to determine the lease, and he would leave the compensation to be assessed at some later date. That, say the landlords, is wrong. If it is wrong, and if the submission of Mr. Duveen is right, it would be the duty of this court to send the case back to the county court judge for further consideration, and if the judge was told by this court that his order was wrong, he would have to look at the matter anew, and he might reduce the rent in the way I have suggested; or he might decline to have the clause in at all. It would be for his consideration. I do not think that such an order would help the landlords very much, though I ought not to express any opinion. The order which was made gave to either party liberty to apply to the court. Either party can apply to the judge on the working out of the order. There is no difficulty about the order; it is one which appears to me to be in accordance with the principles of natural justice.

The case is different in form from any other under this Act so far as I know; but I am satisfied that the order of the county court judge was one which he could make in the circumstances of this case, and I am in favour of dismissing this appeal.

JENKINS L.J. I agree. The sole question in this appeal is whether it was within the powers of the county court judge under section 5 of the Landlord and Tenant Act, 1927, to direct the inclusion in the new lease of the clause which I have just read (the redrafted clause 3 (2), supra).

Mr. Duveen, for the landlords, has contended that this clause did exceed the powers conferred by section 5. He was not concerned to object to that part of the clause which enabled the landlords to determine the term on notice, but he did strongly object to that part of it which, in the event of their taking that course, required them to pay as compensation a sum determined to be the value of the unexpired residue of the term granted by the new lease.

In order to judge whether that contention is right or not it is necessary to look at some of the provisions of section 5. Subsection (1) states the circumstances in which a tenant can claim a new lease, and enables him, if he wishes to claim one, to serve on the landlord within a prescribed period a notice requiring a new lease of the premises in question. The most material subsection is subsection (2). [His Lordship read the subsection and continued:] It will be observed that the language of that subsection is apt to confer on the tribunal a most ample discretion. The new tenancy ordered to be granted can be for such period not exceeding 14 years, and on such terms as the tribunal may determine to be proper. Under those words I have no doubt that it is competent to the tribunal to direct the grant of a new lease for a term not exceeding 14 years determinable by notice at some specified time or on the happening of some specified event. I think that that appears from the words in the subsection, "being "a term of years absolute." That expression under section 25 of the Act is to have the same meaning as it bears in the Law of Property Act, 1925; and the Law of Property Act, 1925, s. 205 (1), definition xxvii, reads: "'Term of years absolute' means a term "of years (taking effect either in possession or in reversion "whether or not at a rent) with or without impeachment for "waste, subject or not to another legal estate, and either certain "or liable to determination by notice, re-entry, operation of law, "or by a provision for cesser on redemption, or in any other event "(other than the dropping of a life, or the determination of a "determinable life interest). . . ." The material words are "either certain or liable to determination by notice."

Plainly then, in my view, it was open to the tribunal in the present case to order the grant of a new lease for five years certain, or, if the tribunal thought fit, to order the grant of a new lease for five years liable to be determined by notice at some specified time or on the happening of some specified event; whether any provision for determination by notice was to be inserted, and, if so, at what time or in what event and on what terms it was to be exercisable being, as it seems to me, matters falling wholly within the discretion of the tribunal.

It is to be observed that the present case was not one in which the landlords were in a position to object to the grant of any lease at all for any of the reasons stated in subsection (3) (*b*) of section 5 of the Act, for the landlords were not able to give any definite assurance that they had any immediate intention of pulling down or remodelling the premises, or that vacant possession of the premises at that time was required in order to carry out a scheme of redevelopment, or that for any other reason the grant of a lease of the premises would not be consistent with good estate management. Being unable to rely on any of those reasons, they agreed that the case was a proper one for a new lease. Nor could they say under subsection (4) that the premises, though not required immediately on any such ground as aforesaid, would be so required after the lapse of a certain period. In that event, under subsection (4) it would have been open to them to insist that the term of the lease should not extend beyond the expiration of the certain period in question unless the lease was made subject to the condition that the landlord might at any time after the expiration of that period, on giving not less than six months' notice in writing, resume possession of the premises if he required them for any such purpose as aforesaid. Finally, the landlords could derive no assistance from subsection (5). [His Lordship read the subsection and continued:] The landlords, therefore, could not insist on the insertion of a provision for determination of the kind provided for in subsection (5), because the lease here was only to be for a period of five years; and it followed that subsection (5) dealing, as it does, only with a period of more than seven years from the commencement of the term, could have no application. The position, then, was that the landlords could not insist on any provision for determination being inserted in the new lease in this case. They could not insist, but they were entitled to represent to the tribunal that it would be right and proper that such a stipulation should be inserted in order that they might not be hampered in the event of it becoming necessary for them to take possession of the premises for the purpose of a rebuilding or development scheme. It was, however, open to the tribunal, when that suggestion was made, to take the view that a plain provision for determination would be unfair to the tenant, Mrs. Lambert, inasmuch as the security of tenure provided for her, in lieu of compensation for goodwill, by means of a new lease for the term of five years would, or might, thus be rendered virtually illusory. If that was the view of the tribunal, I, for my part, cannot see any reason why it should not have been within the discretion of the tribunal to conclude that it would be wrong and unfair to the landlords not to give them any opportunity of determining this tenancy at all; and, on the other hand, that it would be wrong and unfair to the tenant to insert in the new lease a provision simply enabling the landlords to determine without any provision that, in the event of their doing so, they should compensate the tenant for losing the benefit of the residue of the term granted under the order remaining to run at the time of the determination. I cannot, for my part, see any ground for holding that, on coming to this conclusion, it was not well within the powers of the tribunal under the section to direct the insertion in the new lease of a clause in the terms of the clause which is the subject of dispute in the present case.

Mr. Duveen argued that although it might be permissible for the tribunal to make the provision for the determination of the term conditional on the payment by the landlords to the tenant of compensation in the form of some fixed amount, diminishing as the unexpired residue of the term diminished, it could not be right to include in the clause a provision under which the amount of compensation was left to be determined by the court on a future occasion.

In my view, there is no substance in that objection. It seems to me that the provision requiring the compensation to be determined by the court provides the best method of ensuring that the figure arrived at will be the right one and a fair figure to both parties. I see no objection to such a provision in principle, nor, to my mind, is there really any procedural objection. What the county court judge did in effect was to adapt to the particular circumstances of this case the provisions of section 5 (5), the material terms of which are, indeed, reproduced almost verbatim in the disputed clause. Subsection (5) contemplates in certain events the insertion, mutatis mutandis, of a clause in these very terms in the lease ordered to be granted, and it contemplates, just as this clause does, that the compensation should be determined by the tribunal; that is to say, the appropriate county court. I should find it difficult to hold that a procedure prescribed in certain cases by the Act itself in subsection (5) is not capable of being applied for the purpose of working out the provisions of a similar clause such as the clause now in dispute. The order for the grant of the new lease has annexed to it the form of the lease to be granted, and states on its face that the form of lease is so annexed, and it includes a provision to the effect that the parties are to be at liberty to apply to the court as they may be advised. Procedurally it does not seem to me that there should be any real difficulty in bringing before the court under that liberty to apply any matter which it is necessary for the court to determine under the provisions of the clause in question.

Accordingly, for the reasons given by my Lord, and such reasons as I have been able to advance myself, I think that the county court judge came to a right conclusion in this case, and that the appeal should be dismissed.

Hodson L.J. I agree.

Appeal dismissed.

Solicitors: *Markham Thorp & Co.; Herbert Oppenheimer, Nathan & Vandyk.*

M. M. H.

EALES *v.* DALE AND ANOTHER.

C. A.

1954
Mar. 2, 3.

Evershed M.R., Denning and Romer L.JJ.

[Plaint No. J. 541.]

Landlord and Tenant—Rent restriction—Premium—Price of furniture—Grant of tenancy—Furniture to be purchased by tenant—Whether price in excess of "the reasonable price"—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *ss.* 2 *and* 3.

By section 3 (1) of the Landlord and Tenant (Rent Control) Act, 1949, if, as a condition of the grant of a tenancy of premises within the protection of the Rent Acts, a tenant is required to purchase furniture, fittings or other articles and the price required exceeds "the reasonable price of the articles," the excess shall be treated as a premium.

For the purposes of that provision the reasonable price is not a fixed standard, and though the market value of the articles, if they have a market value, is an indication of the reasonable price to pay for them, it is not necessarily conclusive. It is the price which it would be reasonable to expect would be agreed between an incoming tenant who was ready to take the articles and an outgoing tenant who was ready to leave them there. All the circumstances relevant to the value of the furniture fitted and situated in the premises must be considered, but there should be excluded from the price any inflation of the value which is attributable to extraneous circumstances such as the desire of the tenant to obtain a tenancy.

Decision of Judge Reid affirmed.

APPEAL from Judge Reid sitting at West London County Court.

On or about January 28, 1952, the first defendant, Peter Dale, who was the statutory tenant of premises within the protection of the Rent Acts, known as 55, Warwick Gardens, W.14, agreed to let to the plaintiff the second floor flat of the premises. The flat contained furniture belonging to the second defendant, the wife of the first defendant, which the plaintiff agreed to purchase for £500. The plaintiff entered into possession of the flat, but subsequently she brought proceedings against the defendants alleging that the reasonable price of the furniture was £75 (subsequently that sum was increased to £180) and that the difference between that sum and the price which she had agreed to pay was in effect, by section 3 (1) of the Landlord and Tenant (Rent Control) Act, 1949,[1] a premium unlawfully required as a condition of the grant of the tenancy.

The county court judge held that on the facts, which are fully set out in the judgment of Evershed M.R., the price paid was, in all the circumstances, reasonable. The plaintiff appealed.

P. Boydell for the plaintiff. The difference between the price paid (£500) and the price which was agreed at the interview in the solicitor's office as being the true value of the furniture (£350) was a premium within section 3 (1) of the Landlord and Tenant (Rent Control) Act, 1949. It may be that £500 was a reasonable price to pay for the furniture to get a statutory tenancy of that flat at a reasonable rent, but that is not the test which should be applied in determining whether the price paid for the furniture was "reasonable." The test is the reasonable price of the furniture itself, ignoring all extraneous circumstances which might inflate the price paid for the furniture, such as the desire of the tenant to get that particular flat. Admittedly, the furniture must be valued in situ; so that the reasonable price of a fitted carpet would, for example, probably be higher than the amount which it would fetch in an auction room. It may also be shown that the particular tenant in prospect would, because of his particular likes and dislikes, be willing to pay a higher price for certain items than the hypothetical tenant would pay. That would be a relevant consideration in valuing the furniture. The county court judge here found that the two women agreed the value of the items, item by item, but it is submitted that that does not prevent one of them from later contending that the price which was paid was unreasonable, for the "reasonable price" cannot be affected by what the parties may have agreed. They may have acted under a mutual mistake. For example, two parties may agree the reasonable price of a piece of furniture, thinking, mistakenly, that it was the work of Chippendale. If it is subsequently discovered that they have made a mistake they can reopen the matter for the purposes of section 3 (1). Even if they had employed an expert valuer, they would not be estopped from reopening the valuation, though, of course, it would be more difficult to show that the price arrived at as being the reasonable price was wrong. The price which is freely negotiated will, prima facie, be the reasonable price, but it is not conclusively so. The mischief which the section was designed to meet was to protect tenants who would agree to pay excessive amounts for furniture because they were anxious to obtain accommodation. In the present case the parties themselves have agreed that the true value of the furniture was only £350, and that greatly weakens the significance of the first agreed valuation at £500. The provision for a rebate of £150 if the tenancy was lost strongly supports the view that the difference was a premium. It may well be that the parties had come to the conclusion that the first figure (£500), which was higher than Mrs. Dale had expected, was wrong, and that the revised figure of £350 was, as they said, the true value of the furniture at the time when the money was passing. It must be assumed, in the absence of evidence to the contrary, that that was regarded as a valuation of the furniture in situ, though it is unlikely that any special value was attributable to the in situ factor in this case since it was evident that Mrs. Eales intended to sell most of the furniture.

---

[1] Landlord and Tenant (Rent Control) Act, 1949, s. 3 (1): "Where "(*a*) whether before or after the commencement of this Act the purchase "of any furniture, fittings or other "articles has been required as a condition of the grant . . . of a tenancy . . . and (*b*) the price exceeds "the reasonable price of the articles, "the excess shall be treated, for the "purposes of the foregoing provisions "of this Act . . . as if it were a "premium required to be paid as a "condition of the grant . . . of the "tenancy."

D. Wheatley for the defendants. The £350 was the price which the parties thought that the furniture would fetch in a sale room. It excluded in situ value, and that was why it was thought reasonable that there should be a rebate if the tenancy came to an end. In any case, the estimate by the solicitor was not likely to be as accurate as the valuation which was made item by item by the two women. The onus on the plaintiff to show that the price which was agreed after full discussion was unreasonable is heavy, for this is a penal provision. Further, it is not clear that the price was "required" by the landlord within section 3 (1), for the payment was to the landlord's wife and not to the landlord. In fact he lent the money to pay for it. The price which the furniture ultimately fetched when sold is, of course, irrelevant. Moreover, not only was the value of the furniture probably less at the time when it was sold, than when it was purchased by Mrs. Eales, but the sale in an auction room at dealers' prices has no relevance in showing the reasonable price in situ. [Reference was made to *Acebal* v. *Levy*.[2]] Section 2 (5) of the Act of 1949 refers to a premium which has been "paid"; but, strictly speaking, nothing was paid here, though it is conceded that the mortgage was money's worth. But the evidence shows that it was not worth £500, for the mortgage has been transferred to a third party for a lesser amount.

---

[2] (1834) 10 Bing. 376, 383.

A sum paid to anyone other than the landlord is not a premium, even though the payment may be connected with the transaction: see *Rex* v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ld.*[3]

[Evershed M.R. Mr. Dale was acting as Mrs. Dale's agent in selling the furniture. In effect the letting and the sale was one transaction, whereas in *Rex* v. *Birmingham (West) Rent Tribunal; Ex parte Edgbaston Investment Trust Ld.*,[3] there were independent transactions.]

Boydell replied.

Evershed M.R. This is a difficult case, but on the whole I have come to the conclusion that we ought not to disturb the decision of the county court judge, expressed in a reserved judgment which indicates the great care which he had given to the matter. I am not dissatisfied to arrive at that result, for it would be difficult, having regard to all the facts, to find a case which I should have thought less like the type of case to which sections 2 and 3 of the Landlord and Tenant (Rent Control) Act, 1949, were directed; and I add that the plaintiff appears to have impressed the judge as being an unreliable witness of fact.

The circumstances were thus stated by Judge Reid: "At all "material times the first defendant, Mr. Dale, has been tenant "of the house 55, Warwick Gardens. He and his wife, the "second defendant, live in the basement. . . . At that time "Mrs. Eales [the plaintiff] was tenant of an unfurnished flat "at 57, Warwick Gardens, next door, equipped with her own "furniture. She was not happy living there. She was on "friendly terms with the Dales, and, when their second floor "flat became vacant, suggested to Mrs. Dale she should move "there. Mrs. Dale demurred. The flat was furnished and she "could not let it unfurnished; Mrs. Eales already had a flat "and furniture; she did not think Mr. Dale would agree. "However, Mrs. Eales was persistent. She asked what the "furniture in the flat was worth, and whether it would not be "possible for her to buy it, mix it with her own furniture and "sell what she did not want. Mrs. Dale said that if she did "that she could not possibly get her money back as the furniture

---

[3] [1951] 2 K.B. 54; [1951] 1 T.L.R. 77; [1951] 1 All E.R. 195.

" she sold would fetch nothing." That means, of course, that if Mrs. Eales sold the furniture which she did not want to keep, it would not realize enough to pay for the furniture which she had bought from Mrs. Dale. " None the less Mrs. Eales persisted, " and ultimately on October 17, 1951, the two women met at the " flat No. 55 and made an inventory of the furniture there. Mrs. " Dale wrote it out, room by room. When it was completed she " produced such receipts as she had for the price of articles " comprised in it, and, with the assistance of these receipts and " of further inspections of particular items, priced all the items " in the inventory. Both women then signed it. I am satisfied " that Mrs. Eales had full opportunity to discuss and criticize " the prices, and that she was mistaken when she said that they " did not appear in the inventory she signed. The truth may " be that, being headstrong and determined to take the flat at " all costs, she did not much interest herself in the pricing " process."

Copies of these inventories to which the judge referred were produced. Each item bears a price against it, and at the foot of each of the pages there appears the signatures " B. J. Eales " and " G. Dale," and the date October 17, 1951. As I understand the judge, the facts are that these two women went through these lists, item by item, and that after such discussion as the items happened to provoke, they deliberately agreed the figures which were put in, and which appear to have been based in many cases on receipted bills which Mrs. Dale had produced.

It seems to me, on the findings of the judge, that this case is not at all illustrative of the kind of mischief which the provisions of the Act of 1949 were designed to remedy; and in that connexion it is significant that the plaintiff had the advantage of being advised by a solicitor throughout. The defendants were not pressing her to take the flat. They did not really want her to come. Her solicitor advised against her moving and buying this furniture, and in fact everybody was telling her that it was not a very sensible transaction; but she had made up her mind, and nothing would dissuade her. This is, in no sense, a case where the landlord was offering a flat provided that the incoming tenant paid a price, usually a lump sum price, for furniture, whether the tenant wanted it or not.

The kind of case contemplated by Parliament is, I think, illustrated by section 3 (2) of the Act of 1949 which provides: " Where after the commencement of this Act any such pur- " chase as is mentioned in paragraph (*a*) of the last foregoing "subsection is required as therein mentioned, the price demanded "shall, at the request of the person on whom the demand is "made, be stated in writing; . . ." and it is also to be noted that, by section 2 (6), a person requiring a premium, as a condition of, or on the granting, of a tenancy (and if the conditions in section 3 are satisfied, this is deemed to be a premium) commits a criminal offence.

In this case the two women, who may or may not have known much about the value of furniture, considered the furniture item by item and referred to such documentary evidence as there was to arrive at the figure which they agreed should represent the proper price to ask and to pay. That I understand to be the finding of Judge Reid. There remains, however, the question whether the terms of section 3 apply. [His Lordship read section 3 (1).] Mr. Wheatley contended that there had been no requirement, but I think in the circumstances it is plain that there was, and I am going to proceed on that footing. I shall also proceed on the footing that, as the judge held, there was here a payment, although the transaction eventually took the form of a mortgage or charge.

The vital phrase is, of course, that which is contained in section 3 (1) (*b*), namely, "the price exceeds the reasonable "price of the articles." The use of the definite article, "*the* "reasonable price" suggests the conclusion that by that phrase was meant some single standard which must be treated as being the reasonable price, and that if it is exceeded, whatever the circumstances which give rise to the excess, the Act is brought into play. Mr. Boydell, in opening his argument, illustrated that contention by suggesting that if two parties agreed upon a price for a desk which they thought, and reasonably thought, was the work of the master Chippendale, then if it was found later that the desk was not a genuine antique at all, "the reasonable price" in those circumstances would be the reasonable price for the article, having regard to what it was in fact, so that the excess figure which had been arranged upon the mistake of both parties as to the antiquity of the article would be a premium. I cannot accept that view. I think that by the phrase "the "reasonable price of the articles" is meant the price which, in all the relevant circumstances, was the reasonable price for the parties to have agreed. If that be said not to carry the matter much further, I think that at any rate it is clear that Parliament did not intend to fix or to indicate some single immutable figure;

C. A.

1954

EALES
v.
DALE.

Evershed M.R.

and thus I agree with the county court judge that where the articles have a market value according to the ordinary use of that phrase, such a market value, though it would be a strong influence in deciding whether the price was reasonable, is not necessarily conclusive.

Judge Reid said: "In my judgment 'reasonable price' in "section 3 is not necessarily synonymous with market value, and "while, no doubt, the latter is an important element in determining the former, yet in doing so I must also consider the "other circumstances of the case." I agree with that sentence, subject only to the qualification, that, "the circumstances of the "case" must be relevant circumstances, that is to say, they do not, I think, include matters foreign to the furniture itself, for example, the situation of the flat, or the strong desire of the prospective tenant to get the flat in that area. Questions of that kind, I think, are not relevant to the price of the articles. But, on the other hand, to take two illustrations used in the argument, it is relevant that the articles are in the flat; for a carpet fitted into a room is, or may be, worth much more as a carpet for that room than it ever would be worth if it were taken out and sold for what it would fetch elsewhere. Again, the furniture, if of a particular kind, may be particularly desirable to a particular tenant; or again, parties may be ignorant of the value of particular items and may, dealing with each other quite fairly, arrive by mutual consent at a method of fixing the value, which on future investigation proves to be wrong. In estimating the reasonable price, these are circumstances which it is legitimate to take into account. The truth is, in my judgment, that the word "reasonable," as used in section 3, is a question of fact for the judge, just as the word "reasonable," or the test of reasonableness in other places in this legislation, have been held to be matters of fact.

I have read the most important passage in the judgment and, subject to what I have said, I agree entirely with it. I can find nothing in the judgment which satisfies me that Judge Reid made any error of principle in considering whether, as a fact, the figures which these women worked out, item by item, were reasonable. They did not in my judgment, and on the findings as I understand them, take into account circumstances which were extraneous to the subject-matter to be considered.

Therefore, prima facie, if the judge found that this was a reasonable price, in all the relevant circumstances, that is a matter of fact which the Court of Appeal should not disturb.

C. A.
1954

EALES
v.
DALE.

Evershed M.R.

That would be an end of the case were it not for one circumstance which the judge called "formidable," and which was the main basis of Mr. Boydell's argument. The plaintiff's solicitor advised his client against entering into this arrangement, and obviously he took such steps as he could properly take as her legal adviser to try to persuade her to give it up; but he was unsuccessful. On January 25, 1952, some two or three months after the original arrangement, an interview took place at the solicitor's office at which there were present the plaintiff and the first defendant who, though the proprietor of the flat, did not own the furniture. The judge's note of the interview is: "Mr. MacDougal [the "solicitor] told Mrs. Eales that Mr. Dale might lose his right to "55, Warwick Gardens (bearing in mind, he told me, for instance, "that Mr. Dale might die) with the result that Mrs. Eales would "lose her tenancy. In that event it would be unfair for her to "have paid more than the actual value of the furniture. He then "asked both Mrs. Eales and Mr. Dale what was the value of the "furniture—was it worth £500? Mrs. Eales and Mr. Dale had "a short conversation together, and agreed in general terms, that "the furniture was worth about £350. Mr. MacDougal said "that in that case if Mrs. Eales lost the tenancy, she should "have a rebate, and there was then inserted in the draft memo"randum of the tenancy a provision to the effect that if the "tenancy was terminated prematurely, there should be a rebate "of £150."

The next paragraph related to the memorandum, but eventually the rebate provision was dropped out. Judge Reid's note continued: "On this part of the case I prefer the evidence of Mr. "MacDougal to that of Mr. Dale, who denied that the £150 rebate "was discussed at any time. The incident certainly suggests "that the £500 was an inflated price for the furniture. The price "of £500 was determined, however, not in January, 1952, but "in October, 1951, when the inventory was made, in the manner "I have described, by Mrs. Dale, who according both to herself "and her husband owned the furniture. She impressed me as a "witness of truth. I am satisfied that Mrs. Eales was more "anxious to take a tenancy of the flat than Mrs. Dale that she "should have one, and that no pressure was brought to bear on "Mrs. Eales by the Dales to enter into the arrangement. . . . I "am satisfied that Mrs. Dale had no intention of making any "undue profit out of Mrs. Eales. Mrs. Dale thought the whole "transaction an uneconomic one from the point of view of Mrs. "Eales and told her so. I find that, when Mrs. Eales insisted on "going on, and Mrs. Dale made and priced the inventory, Mrs. "Dale considered the price of £500 at which she arrived a fair "and reasonable price in the circumstances, although had it been "tested by an expert valuation of the furniture, it would have "proved to have been a good deal in excess of the current market "values. To Mrs. Dale's figure of £500 Mrs. Eales, a free agent, "assented, and in all the circumstances Mrs. Eales failed "to satisfy me that £500 exceeded the reasonable price of the "furniture."

I have read that at length because if the proper inference from it was that, in truth, the furniture was worth only £350 and the contracting parties understood that it was worth only £350, and that the £150 was added because Mrs. Eales was so anxious to get the flat, then of course the inevitable conclusion is that the £150 was a premium, and could not have been anything else. It is, therefore, plain that Judge Reid did not intend to find that fact as a result of the evidence. Having looked at the evidence, the judge's finding closely followed the solicitor's own words; he said: "Mrs. Eales and Mr. Dale had a short conversation "together and agreed in general terms, that the furniture was "worth about £350. Mr. MacDougal said in that case if Mrs. "Eales lost the tenancy, she should have a rebate."

It is not, of course, for me to say what inference I might have drawn if I had heard the evidence of the witnesses. But it is, I think, clear that on the facts a possible inference, and one which the judge of fact was entitled to draw, was that Mr. MacDougal was pointing out: "It is all very well, but you are "moving out of the flat where you are a statutory tenant and "have got security. You are moving somewhere else, and if "Mr. Dale should die you will then suddenly find yourself without a home. You will have bought all this furniture, and you "will have to get rid of it and sell it. I do not say that you "will necessarily have to sell it by auction, but you will have "to get rid of it, and if the furniture is thus thrown on your "hands and taken out of the flat, what will it be worth?" It was to that query that the answer was given: "£350," and, in those circumstances, to say that the £500 was "inflated" (although there is, of course, an opprobrious significance in the word "inflated") does not mean that it was unreasonable for the purposes of section 3. It may fairly mean no more than that the £500 was what the parties fairly bargained and thought that the furniture was worth in situ, as distinct from what it might be worth if it had to be taken out of the flat and sold.

It seems to me that this court, dealing with the matter as one of fact, is not in a position to say that the judge, who treated the matter as one of difficulty and gave to it the closest consideration, was not entitled to find that, notwithstanding this incident, the price of £500 for the furniture in situ was not proved to him to be unreasonable, having regard to all the facts, including the highly significant fact found by the judge that these two women deliberately priced the furniture, item by item, according to the evidence of value which was available to them.

[His Lordship then considered the cross-appeal on the matter of costs, which does not call for report. He concluded:] I have, therefore, reached the conclusion that we should not disturb the judge's finding, and in my judgment the appeal fails and should be dismissed with costs. The cross-appeal fails and should be dismissed with costs also.

DENNING L.J. "The reasonable price" within section 3 of the Act of 1949 means, I think, the price which is reasonable between the parties for the articles as they are, fitted and situate in the premises, without regard to extraneous circumstances, such as the desire of the tenant to obtain a tenancy. It is not the price which would be realized if the articles were removed from the premises and sold in an auction room. It is the price which would reasonably be expected to be agreed between an incoming tenant who was ready to take the articles over and an outgoing tenant who was ready to leave them there. In applying that test, so far as the incoming tenant is concerned, he would no doubt have regard to the cost to which he would be put if he had to buy the articles and fix them in the premises himself, making, of course, an allowance for depreciation. So far as the outgoing tenant is concerned, he would have regard to the fact that if he had to take them out, they would fetch very little. It is obvious that, as beween a willing outgoing tenant and a willing incoming tenant, there is room for a good deal of latitude in the ascertainment of the figure: but if the price put on the articles was more than the replacement cost, that could not be a "reasonable" price. In this case the parties together made an inventory of the articles. They based their figures on the cost prices, making presumably some allowance for depreciation. I do not think that anyone could say that the price they agreed was not the reasonable price as between them.

Difficulty arises because the judge said that the market value would not exceed £350, but what "the market value" means in this connexion I do not know. If it meant the realizable value if the goods were taken out and sold in an auction room, that would not be the right test. I do not think that his reference to "market value" is sufficient to outweigh the important fact that the parties themselves fixed the prices freely, without any feeling of constraint or compulsion. I agree, therefore, with my Lord, that this is not a case in which the Court of Appeal should interfere. I agree that the appeal should be dismissed, and the cross-appeal should be dismissed also.

ROMER L.J. I agree, and I respectfully adopt what my brethren have said as to the meaning of the phrase "the reasonable price of the articles" in section 3 (1) (*b*) of the Act of 1949. It is plain that the price which was agreed, in the circumstances in which it was agreed, between the plaintiff and the second defendant, was such as to bring the price for the furniture, fairly and squarely, within the definition which my brethren have indicated. If the matter had rested there I think that the plaintiff would have had a hopeless case in attempting to recover back part of the purchase price; but, fortunately for her, in the course of the trial before the county court judge, the plaintiff's solicitor gave some evidence which, although in complete contradiction of the evidence which she herself had given on the same point, provided her with a case. That evidence was that to which my Lord has referred, as to the conversation which the solicitor said took place in his office when the plaintiff and the first defendant were there, when he asked them both what was the value of the furniture: "Mrs. Eales and Mr. Dale had a "short conversation together, and agreed in general terms, that "the furniture was worth about £350." The solicitor said, in that case, if the plaintiff lost the tenancy she should have a rebate, and that is how the rebate originally arose. The plaintiff said that at that meeting the value of the furniture was not mentioned, but luckily for her the judge did not believe her evidence, but accepted the evidence of the solicitor, and so she had a weapon put unexpectedly into her hands of which she has sought to avail herself.

I agree that the explanation of that conversation was not that the parties were agreeing that the furniture was really only worth £350, because that would have led to the inevitable conclusion that the extra £150 was a premium, and upon that the judge could only have come to one conclusion, which would be the opposite conclusion to that at which he actually arrived.

The alternative conclusion, which I think was open, on the evidence of the solicitor, was that the furniture was worth £500 to anybody who was coming in as a tenant of the flat, because the furniture was in the flat. It may be that the carpets were fitted, the curtains were hung to fit the height of the walls, and so on, but if the plaintiff had had to move out of the flat and put the furniture on the market, she probably would not have got more than £350 for it; but the interpretation of the discussion was not by any means inevitably that they were agreeing that the furniture was only worth £350 to the plaintiff, and accordingly, she has not even that much comfort in her case. I agree with my brethren that the appeal must be dismissed, and the cross-appeal also.

Appeal dismissed, appellant to pay party-and-party costs of both respondents. Cross-appeal of first defendant dismissed with costs, the contribution of the first defendant to be the full amount of those costs, with a provision that the costs to be paid by the appellant to the first defendant to be subject to a right of set-off of the first defendant's obligation to pay the costs of the cross-appeal.

Solicitors: *Galbraith & Best; How, Davey & Lewis.*

E. D.

C. A.
1954
Jan. 27;
Mar. 5

Evershed M.R., Denning and Romer L.JJ.

GOODMAN *v.* J. EBAN LD.

[1952 G. No. 3243.]

Solicitor—Signature—Bill of costs—Facsimile rubber stamp signature —Business name of solicitor affixed to bill by a rubber stamp— Solicitor practising alone—Whether bill duly "signed"—Solicitors Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 65.
Signature. Business Name—Signature—Sole proprietor.

The plaintiff, a solicitor practising alone under a business name, sought to recover £50 9s. 6d. for professional services rendered to the defendant company. The plaintiff had sent to the defendants a bill of costs accompanied by a letter which bore a facsimile of the plaintiff's business name in the plaintiff's handwriting impressed on it by a rubber stamp. It bore no other signature. The plaintiff had himself affixed the stamped signature to the letter. The defendants contended that the requirement as to signature of section 65 (2) of the Solicitors Act, 1932, had not been complied with:—

Held (Denning L.J. dissenting), that the letter, since it bore a signature placed there by the plaintiff solicitor himself by means of a rubber stamp containing a facsimile representation of his own signature, had been "signed" by the plaintiff for the purposes of section 65, and that such signature, although in the plaintiff's business name, was a good signature by the plaintiff for the purposes of the section.

Bennett v. *Brumfitt* (1867) L.R. 3 C.P. 28 and *Jenkins* v. *Gaisford and Thring* (1863) 3 Sw. & T. 93 applied.

In re Prince Blücher [1931] 2 Ch. 70; 47 T.L.R. 19 distinguished.

Quaere, whether a typed or printed representation of the solicitor's name or that of his firm would satisfy the requirements of the section.

Regina v. *Cowper* (1890) 24 Q.B.D. 533; 6 T.L.R. 179 considered.

As a matter of practice, in the absence of some incapacity on the part of a solicitor, the use of a rubber stamp to sign a bill of costs, or the letter accompanying it, for the purpose of satisfying section 65 (2) of the Act of 1932 is not desirable, since such a method of signing does not carry with it the same authenticity or warrant of responsibility as a written signature.

Per Denning L.J. Ever since the year 1605 there have been statutes in force which clearly required a solicitor to write his name with his own hand and did not permit the use of a facsimile on a solicitor's bill. The Act of 1932 was a consolidation Act, and I do not think that it altered the law or that Parliament intended in 1932 to allow solicitors to use a rubber stamp for the first time.

APPEAL from Judge Bensley Wells sitting at Marylebone County Court.

The plaintiff, Charles Goodman, was a solicitor practising alone as Goodman, Monroe & Co. In these proceedings he claimed the sum of £50 9s. 6d. from J. Eban Ld. for professional services. On June 23, 1952, the plaintiff sent to the defendants a bill of costs. That bill was accompanied by a letter which ended in typewriting "Yours faithfully, Goodman, Monroe & Company." Below that the name "Goodman, Monroe & Co." had been put on the letter by means of a rubber stamp. The signature so affixed was a facsimile of the plaintiff's handwriting and such stamped signature had been affixed, it appeared from the evidence, by the plaintiff himself.

The county court judge gave judgment for the plaintiff. The defendants appealed on the ground that the letter accompanying the bill of costs did not satisfy the requirements of section 65 (2)

(i) of the Solicitors Act, 1932,[1] since a mark made by a rubber stamp was not capable of being the plaintiff's signature.

M. O'C. Stranders and *Malcolm Milne* for the defendants. The bill of costs which the plaintiff delivered to the defendants for professional services, which he alleges that he had rendered to them, did not satisfy the requirements of section 65 of the Solicitors Act, 1932, in that it was not signed by the plaintiff or accompanied by a letter so signed. The letter which accompanied the bill purported to be signed by means of a facsimile signature of the name " Goodman, Monroe & Company," being the business name in which the plaintiff carried on business, affixed to the letter by a rubber stamp. That was not a compliance with section 65 (2) of the Act of 1932 for two reasons. First, the section requires that the bill shall " be signed by the solicitor." That means that it must be signed by his own hand. If the plaintiff is correct the bill could bear a typed signature. [*Bennett* v. *Brumfitt*[2] was referred to.] The Wills Act, 1837, authorizes signature by an agent. The Solicitors Act, 1932, does not. The Solicitors Act, 1843, s. 37, required the bill to be subscribed by the proper hand of the solicitor. The Act of 1932 was a consolidating Act and was not intended to alter the former practice which had been followed for 140 years. The object of section 65 is to protect the lay client by assuring that the solicitor has personally approved the bill. That protection is lost if a bill can be stamped with a rubber stamp, since anyone can place a rubber stamp on a bill. The client cannot know whether it has been placed there by the solicitor himself or not. Reliance is placed on the decision in *In re Prince Blücher*.[3] There is no authority which suggests that, in the case of a solicitor's bill, anything but a signature made by himself under his own hand is sufficient to satisfy the section.

Secondly, where one man carries on business under a business name, he must sign his own name in order to comply with section 65 (2). The provisions in the section as to signature of a bill, where the costs are due to a firm, cannot apply to the case of a one-man practice. The only firm contemplated in section 65 is a partnership. There cannot be a firm consisting of one partner: *McLean* v. *Weaver*.[4] This bill should have been signed by the plaintiff with his own hand and in his own name. Not having been so signed, he is precluded by section 65 from bringing an action to recover his costs.

---

[1] Solicitors Act, 1932, s. 65: " (1) " Subject to the provisions of this Act, " no action shall be brought to recover " any costs due to a solicitor until " one month after a bill thereof has " been delivered in accordance with " the requirements of this section: " . . . (2) The said requirements are as " follows: (i) The bill must be signed " by the solicitor, or, if the costs are " due to a firm, one of the partners " of that firm, either in his own name " or in the name of the firm, or be " enclosed in, or accompanied by, a " letter which is so signed and refers " to the bill."

[2] (1867) L.R. 3 C.P. 28.

[3] [1931] 2 Ch. 70; 47 T.L.R. 19

Leonard Halpern for the plaintiff. The answer to the question raised in this appeal depends on the true construction of section 65. A solicitor's executors or administrators can, in view of the provisions of section 64, sign for the purposes of section 65. Accordingly, it is not only the solicitor himself who can sign for the purposes of section 65. Parliament did not intend to penalize a one-man firm. The plaintiff's business name is duly registered under the Registration of Business Names Act, 1916, at the Law Society. There is no sound reason why he should not sign in his business name, that being the name by which he is known to his clients. He may sign either in his own name or in his business name.

As to the defendants' first contention; it is now too late to seek to upset the effect of the authorities which have held that a signature by means of a rubber stamp is a good signature: *Bennett* v. *Brumfitt*[5]; *In re the Goods of Bryce*[6]; *Jenkins* v. *Gaisford and Thring*.[7]

March 5. The following judgments were read.

EVERSHED M.R. This was an action to recover the sum of £50 9s. 6d. alleged to be due to a solicitor for performing services according to a bill claimed to have been duly delivered on June 23, 1952. The plaintiff, Mr. Charles Goodman, carries on, and carried on at all material times, the business of a solicitor under the name of Goodman, Monroe & Co. He was the sole proprietor of the business—as is sometimes said, the "sole "partner." The defendants raised a number of defences to the claim, including allegations that they had never retained the plaintiff, that the services had never been rendered, and that the plaintiff had promised to make no charge for any services which he had performed. Upon all these matters (which were questions of fact) the judge wholly disbelieved the evidence on the defendants' part and accepted the evidence of the plaintiff.

---

[4] (1924) 41 T.L.R. 47.

[5] L.R. 3 C.P. 28.

[6] (1839) 2 Curt. 325.

[7] (1863) 3 Sw. & T. 93.

The defendants, however, raised a further defence of a technical nature, namely, that the bill sued upon, not having satisfied the conditions in section 65 (2) of the Solicitors Act, 1932, could not form the subject-matter of an action to recover the sum claimed under subsection (1) of the same section.

Section 64 (2) provides that for the purposes (inter alia) of section 65, " the expression ' solicitor ' includes the executors, " administrators and assignees of the solicitor in question."

It was the case of the defendants in the court below, and has been their case argued in this court, that the plaintiff's bill did not satisfy the requirements in section 65 (2) in two respects: first, the " signature " at the end of the plaintiff's letter of June 23, 1952, enclosing his bill, was not written by him in his handwriting but was impressed by means of a rubber stamp, on which was engraved a facsimile of the signature " Goodman, " Monroe & Co."; and, secondly, the so-called " signature " was that of the plaintiff's business name and not that of his own name. The plaintiff proved in evidence (and his evidence was accepted by the judge) that the impressing of the stamped signature on the letter had been done by the plaintiff personally, who kept the stamp locked up in his own room so as to be available only for his own use. It did not appear in evidence whether the stamped signature was a representation or facsimile of the plaintiffs' own handwriting, but no point was taken below to the contrary effect, and the argument in this court has proceeded upon the basis that the signature in question is a facsimile of the plaintiff's own handwriting. The judge rejected these technical defences on the defendants' part, as he had rejected their defences on the merits, and gave judgment accordingly to the plaintiff for the sum claimed.

I have found the questions raised matters of some difficulty: and although, for reasons which will appear, I agree with the view taken by the judge below and think, accordingly, that the bill sued upon was properly delivered in accordance with the Act, I am bound to say that, as a matter of good practice, the " signature " of a bill of costs, or of a letter enclosing such a bill, by means of a rubber stamp seems to me in general undesirable. There is no doubt that the parliamentary purpose in enacting section 65 was to impose upon the solicitor (or upon one of the members of a partnership firm of solicitors) personal responsibility for any bill of costs delivered: and although there are other provisions in the Act for the protection of the client, including a right on his part to have the bill taxed as provided by the Act, it is no doubt also true to say that the client was intended to have the assurance, by means of the personal authentication of the solicitor (or of a partner in a firm), that the bill delivered was a proper bill.

The matters which I have last stated are significant, since they constitute the background against which the section must be construed: and I confess that, if the matter were res integra, I should be disposed to think, as a matter of common sense and of the ordinary use of language, that when Parliament required that the bill should be " signed " by the solicitor, it was intended that the solicitor should personally " sign " the bill or letter in the ordinary way by writing his name (or, where appropriate, the name of his firm) in his own hand with a pen or pencil.

The matter is, however, not free from authority. The judge in the court below relied upon *Bennett* v. *Brumfitt*.[1] That was an appeal to the Court of Common Pleas from a decision of the revising barrister for the borough of Liverpool, who had been of opinion that the objection of the respondent to a name being retained on the list of voters for the borough was a valid objection within section 17 of the statute 6 Victoria, chapter 18, which enacted that the " notice of objection shall be signed by " the person objecting." In that case (as in the present) the objector's name had been affixed by him to the notice by means of a stamp upon which was engraved his ordinary signature. The court affirmed the view of the revising barrister, and I will cite in full the judgment of Sir William Bovill C.J.[2]: " The question in " this case is whether the notice of objection was ' signed by the " ' person objecting,' within the meaning of section 17 of 6 " Victoria, chapter 18. The name of the objector was affixed to " the notice by himself by means of a stamp upon which was " engraved his ordinary signature. I am of opinion that that " was a perfectly good signature within this statute. It is clear " that it would be a good signature within the Statute of Frauds. " It is equally clear that it would have been a good signature to " a will. The decision of the revising barrister was therefore in " my judgment perfectly correct. The ordinary mode of affixing " a signature to a document is not by the hand alone, but by the " hand coupled with some instrument, such as a pen or pencil. " I see no distinction between using a pen or a pencil and using " a stamp, where the impression is put upon the paper by the " proper hand of the party signing. In each case it is the personal

---

[1] (1867) L.R. 3 C.P. 28.

[2] Ibid. 30.

"act of the party, and to all intents and purposes a signing of "the document by him. If the objector here had used a pencil "or a paint-brush, it would hardly have been contended that he "had not signed the notice. I think the requirement of the "statute has been sufficiently complied with."

The other members of the court were of the same opinion. "The using a stamp," said Willes J.,[3] "is only a compendious "way of writing the party's name." Byles J. agreed with the Chief Justice that such a signature would be sufficient for the purposes of the Statute of Frauds and the Statute of Wills. Finally, Keating J. observed[4]: "I see no reason why a different "construction should be put upon signing under this statute from "that which it has received under the Statute of Frauds and the "Statute of Wills . . . I am at a loss to see how the genuineness "of a notice of objection is better authenticated by a signature by "means of a pen than by means of an impression of a stamp "affixed by the party's own hand." The relevant language in the Statute of Frauds, 1677, section 4 is well known—the memorandum or note must be "signed by the party to be charged." In the case of the Wills Act, 1837, the relevant formula in section 9 is "it shall be signed at the foot or end thereof by "the testator." In the case of the latter Act, the authority cited—*Jenkins* v. *Gaisford and Thring*[5]—may usefully be referred to: for in that case the testator had, towards the end of his life, had his usual signature engraved, so that it might be stamped on letters and other documents requiring his signature, and the two codicils in question were so stamped in the testator's presence and by his direction by another person. Sir C. Cresswell, in the course of his judgment, said[6]: "It has "been decided that a testator sufficiently signs by making his "mark . . . Now, whether the mark is made by a pen or by "some other instrument cannot make any difference, neither "can it in reason make a difference that a facsimile of the whole "name was impressed on the will instead of a mere mark or "cross. The mark made by the instrument or stamp used was "intended to stand for and represent the signature of the "testator."

In the case last cited it will be observed that the stamp had been impressed not by the testator himself but by another in the testator's presence and by his direction; and there is added to the formula, which I have quoted from section 9 of the Wills Act, words authorizing such a vicarious signing. Similarly, there are added to the corresponding formula in the Statute of Frauds the well-known words "or by some person thereunto by him law-"fully authorized." But these additions are not relevant to the present problem and do not qualify the authority of the cases cited; for the question is not by whom, but how, the relevant document must be "signed." I do not therefore think that *In re Prince Blücher*,[7] cited by Mr. Stranders, assists the solution; for that case only decided that section 16 (1) of the Bankruptcy Act, 1914, which requires that a proposal for composition should be signed by the debtor, was not satisfied if the proposal was signed by a firm of solicitors representing the debtor's interests.

---

[3] L.R. 3 C.P. 31.
[4] Ibid. 32.
[5] (1863) 3 Sw. & T. 93.
[6] Ibid. 96.

In my judgment, therefore, it must be taken as established, from the citations which I have made, that where an Act of Parliament requires that any particular document be "signed" by a person, then, prima facie, the requirement of the Act is satisfied if the person himself places upon the document an engraved representation of his signature by means of a rubber stamp. Indeed, if reference is made to the Shorter Oxford English Dictionary, it will be found that the primary meaning of the verb "to sign" is not confined to actual writing with a pen or pencil. The word in origin appears to have related to marking with the sign of the cross. But the later meanings include "(2) "To place some distinguishing mark upon (a thing or person)" and "(4) To attest or confirm by adding one's signature; to affix "one's name to (a document, etc.)." It follows, then, I think, that the essential requirement of signing is the affixing in some way, whether by writing with a pen or pencil or by otherwise impressing upon the document, one's name or "signature" so as personally to authenticate the document.

If this view is right, then, since the formula used in the Solicitors Act, 1932, does not differ from the formula in the other Acts to which I have referred, there would seem to be no reason why a different requirement should be imposed from such as would be satisfied in the other cases: for, in all the cases, the essential requirement is, but is not more than, the personal authentication of the individual "signing." And it is not, in my judgment, to be forgotten that, when Parliament used the formula now appearing in section 65 (2) of the Act of 1932, it had been long established in the courts that the impressing by the person concerned of a facsimile signature by means of a rubber stamp was a "sufficient" signature by him.

---

[7] [1931] 2 Ch. 70; 47 T.L.R. 19.

The requirement of signature of a document appears elsewhere in the Solicitors Act, 1932—for example, of a written declaration for the purposes of a practising certificate (section 37); of the roll of solicitors (section 44); of the written agreement in relation to a lump sum bill in non-contentious business (section 57). In no case does it appear from the language used or the context that signature in any particular form or manner is required. In other sections a different formula is used, namely, writing under his (or their) hands, for example, in section 3 in reference to admission by the Master of the Rolls, and in section 26 in reference to dissents on the part of the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls to regulations relating to examinations. In my judgment these other sections of the Act do not throw any light upon the subject of the present appeal.

But it was said that a different and stricter view should be taken of the requirement in this section than was appropriate in the case of the Acts considered in the decided cases. In the first place it was contended that the proper protection of the client required that he should be satisfied, from the document which he received, that the solicitor had, by personally signing such document, assumed full responsibility for it: and that, if such document appeared to be signed by means of a stamp, then he could not be so satisfied, since he could not know, and should not assume, that the stamp had been impressed in fact by the solicitor personally. Further (and perhaps more significant) the Solicitors Act, 1932, is by its full title expressed to be an Act for consolidating the previously enacted law relating to solicitors, and it was pointed out that, for a very long period of time prior to the passing of the Act of 1932, the formula which had in the corresponding sections of earlier Acts been consistently used was "subscribed with the proper hand of the attorney"—a formula which (as it was argued) could not be satisfied by the impress of a rubber stamp. Assuming (though I must not be taken to be deciding) that this last-mentioned formula would not be satisfied by the use of a rubber stamp, nevertheless, in my opinion, these considerations are not sufficient to outweigh what, in my judgment, must now be taken to be the ordinary meaning of a formula such as that now contained in section 65 (2) of the Act of 1932. To hold otherwise would, as it seems to me, be to introduce grave doubt and uncertainty into the use of such a formula, and to open the way to arguments for creating fine distinctions between one statute and another, which I cannot think would be justifiable. Although it is true that a signature apparently made by the use of a stamp might not, on the face of it, carry the same assurance of authenticity as a signature written in the ordinary way, with a pencil or pen, still, the solicitor, no less than the client, may be expected to know what the section requires, and there would be nothing to prevent the client, if in doubt, from inquiring of the solicitor whether he had personally authenticated the bill or accompanying letter. In all the circumstances, therefore, I think that where, as here, the signature on the letter is shown to have been placed by the solicitor himself by means of a stamp containing a facsimile representation of his own signature, then the document must be taken to be " signed " by him within the meaning of section 65 (2) of the Act of 1932.

It is unnecessary for the purposes of this case to express any view whether the same result would follow if the " signature " impressed by the stamp was not a facsimile representation of the solicitor's handwriting, but a mere typed or printed representation of his name or the name of his firm: and I accordingly express no opinion upon that matter, save to observe that ex facie it would not appear to carry the same warrant of authenticity, and to refer to *Regina* v. *Cowper*,[8] in which Lord Esher M.R. and Fry L.J. in this court differed upon the question whether a mere lithographed representation of a solicitor's name on a plaintiff's particulars in the county court constituted a signature by him for the purpose of the county court rules. I venture to repeat that, although I have come to the conclusion as a matter of law which I have expressed, it does not seem to me that as a matter of practice, at least in the absence of some incapacity on the part of the solicitor, such a method of signing a bill or accompanying letter for the purpose of satisfying the requirements of section 65 (2) of the Act is desirable, since such a method of signing does not carry with it the same clear authenticity or warrant of responsibility as a signature written in the more ordinary way.

I pass to the defendants' second point, which is that, if the solicitor may " sign " the bill or accompanying letter by impressing thereon an engraved representation of his ordinary handwritten signature, still the " signature " must, in the case (as the present) where the solicitor is the sole owner of the business, be the writing of his own proper name and not the name of the business which, as a solicitor, he conducts. Again, a first impression favours the defendants' contention, and the argument on their behalf is supported by the circumstance that, according to the language of the paragraph in the subsection, the use of the "firm" name is expressly authorized in the case of a firm (that is, a partnership of two or more partners) and therefore (it is contended) by necessary implication excluded in the case of the one-man business. As a matter of construction, the words "either in his own name or in the name of the firm" relate, in my judgment, only to the second alternative, "or if the costs are "due to a firm, etc."; and, in the earlier enactments, the passage beginning with the words "or if" down to and including the words "in the name of the firm," or the corresponding passage, was enclosed in brackets. But upon further reflection I have reached also upon this point the same conclusion as that of the judge. Although the reference to the firm name is expressly related to the case of a partnership, it was, in my judgment, required to make clear that in such case the signing partner might subscribe either his own or the firm name; and it is to be noted that either alternative constitutes a "signing" by the solicitor concerned. Bearing in mind, therefore, what I have said above of the meaning of the word "sign," and that the name "Good-"man, Monroe & Co." is, in truth, the plaintiff's trading or professional name (registered as such under the Registration of Business Names Act, 1914), I think that the signature "Good-"man, Monroe & Co." is as much the plaintiff's signature for the purposes of the Act of 1932 as a writing of his name "Charles "Goodman" or "C. Goodman"; and in this case I think that the sense and purpose of the statutory requirement (including the protection of, and assurance to, the client) is certainly no less well served by a signature in the name of the business, the services of which the client engaged and to which he would normally pay the costs due.

---

[8] (1890) 24 Q.B.D. 533; 6 T.L.R. 179.

The point is a short one and is not illuminated by any authority. *McLean* v. *Weaver*[9] (cited by Mr. Stranders) is not, in my view, in point. That case decided the wholly different question that a bill signed by the plaintiff in his own name satisfied the requirement of the Act though, when the bill was delivered, the plaintiff had taken a partner and then carried on the business in a firm name, which also appeared on the letter but which did not exist when the costs were incurred. Nor do I think that the defendants' argument is assisted by the definition contained in section 64 (2). It is unnecessary to decide in this case whether the personal representatives of a solicitor, who had carried on a practice alone, could sign a bill in the deceased solicitor's business name or style.

---

[9] (1924) 41 T.L.R. 47.

Although, therefore, it may be prudent practice for a solicitor, in the position of the present plaintiff, to " sign " by adding his own name to that of the name of his business, I think that the signature " Goodman, Monroe & Co." was a good signature by the plaintiff for the purposes of the section. In my judgment, accordingly, the appeal fails on both points and should be dismissed.

DENNING L.J. I have come to a different conclusion.

In modern English usage, when a document is required to be " signed by " someone, that means that he must write his name with his own hand upon it. It is said that he can in law " sign " the document by using a rubber stamp with a facsimile signature. I do not think that this is correct, at any rate, not in the case of a solicitor's bill. Suppose that he were to type his name; or suppose that he were to use a rubber stamp with his name printed on it in block letters? No one would then suggest that he had signed the document. Then how does the facsimile help it? Only by making it look as if he had signed it, when in fact he has not done so. It is the verisimilitude of his signature, but it is not his signature in fact.

If a man cannot write his own name, then he can " sign " the document by making his mark, which is usually the sign of a cross: but in that case, he must write the mark himself, and not use a typewriter, or rubber stamp, or even a seal.

The virtue of a signature lies in the fact that no two persons write exactly alike, and so it carries on the face of it a guarantee that the person who signs has given his personal attention to the document. A rubber stamp carries with it no such guarantee: because it can be affixed by anyone. The affixing of it depends on the internal office arrangements with which the recipient has nothing to do. This is such common knowledge that a " rubber " stamp " is contemptuously used to denote the thoughtless impress of an automaton, in contrast to the reasoned attention of a sensible person.

It has long been held that a man cannot " sign " a document by putting his seal upon it, see a case in 1620 reported in Rolle's Abridgement, vol. 1, 245, pl. 25: and the reason was well given by Lord Hardwicke L.C. in 1752, when he said: " How can it

" be said, that putting a seal to it can be a sufficient signing? " For anyone may put a seal," *Grayson* v. *Atkinson*.[10] If such be the case of a seal, a fortiori with a rubber stamp: for anyone can affix a rubber stamp.

It is said that a rubber stamp is a signature so long as it is affixed by the solicitor himself: but if we were to admit a rubber stamp to this extent, it would open wide the door to evasion: for no one could ever check whether the solicitor did in fact affix it with his own hand. A clerk in a branch office could affix it without anyone being a penny the wiser. Despite all this, however, it is said that we are bound by authority to hold that whenever a statute requires a document to be " signed " by a man, the requirement is satisfied if he uses a rubber stamp alone, without putting his hand to the paper. The cases to which we were referred can, I think, all be explained by the nature of the documents there under consideration. They were not such as to require a personal signature. I can well understand a rubber stamp being accepted in the case of a will, because there is the guarantee of authenticity by two persons then present. I can understand also a rubber stamp being accepted in the case of a memorandum under the Statute of Frauds, because a printed heading will suffice for that purpose, whereas no one would describe it as a signature for any other purpose. The same with a notice of objection to a voting list: because that was an impersonal document issued out of the office of a political agent so as to get the matter considered by a revising barrister.

It is very different with documents which plainly require a personal signature. Has anyone ever supposed that a man can sign a bill of exchange or a cheque by means of a rubber stamp? or that a man can execute or witness a transfer of shares in such a way? And has anyone ever before this case supposed that a solicitor could sign his bill of costs by a rubber stamp alone? Ever since the year 1605 there have been statutes in force which have required that a solicitor's bill should be " subscribed with " his own hand and name " (Act of 1605, 3 James I, c. 7, s. 1), and " subscribed with the proper hand of such attorney or " solicitor " (Act of 1729, 2 Geo. 2, c. 23, s. 23, and Act of 1843, 6 & 7 Vict. c. 73, s. 37). Those statutes clearly required him to write his name with his own hand; and did not permit the use of a facsimile. The Act of 1932 was a consolidation Act. It is presumed not to have altered the law, and I do not think that it did alter the law. Solicitors have had to sign their bills for the last 350 years, and I do not think that Parliament in 1932 intended to allow solicitors to use a rubber stamp for the first time. Indeed, I think that most practising solicitors would be surprised by the suggestion.

---

[10] (1752) 2 Ves.Sen. 454, 459.

I would therefore allow this appeal on this ground, and it is unnecessary for me to say anything about the other ground.

Romer L.J. (read by Evershed M.R.). Although neither of the questions which was argued before us admits of a very confident answer, I am of opinion, on the whole, that the defendants' contentions upon both of them should be rejected.

The first point is whether the fact that the plaintiff's letter of June 23, 1952, bore a facsimile signature impressed by a rubber stamp is insufficient, notwithstanding that it was applied by Mr. Goodman personally, to constitute a signature for the purposes of section 65 of the Solicitors Act, 1932. The first reaction of many people, I think, would be that the impression of a name produced by a rubber stamp does not constitute a signature and indeed, in some sense, is the antithesis of a signature. When, however, the matter is further considered in the light of authority and also of the function which a signature is intended to perform, one arrives, I think, at a different result. The Master of the Rolls (whose judgment I have had the advantage of reading) has dealt with the matter fully from every relevant standpoint, and I agree with the conclusion which he has reached and with the reasons upon which that conclusion is founded.

It is stated in Stroud's Judicial Dictionary (3rd ed.) under the title "Signed; signature" that "speaking generally a "signature is the writing, or otherwise affixing, a person's name, "or a mark to represent his name, by himself or by his authority "with the intention of authenticating a document as being that "of, or as binding on, the person whose name or mark is so "written or affixed." This statement appears to me to be in accord with the authorities, and, in my opinion, Mr. Goodman's letter was "signed" within this formula. The letter was typewritten and concludes with the words (also typed) "Yours faithfully Goodman, Monroe & Company." This was immediately followed by a repetition of the firm name, in a form which looks at first sight as though it had been written by hand, but which in reality was impressed by Mr. Goodman through the medium of a rubber stamp. This repetition would be plainly otiose were

C. A.
1954

Goodman v. J. Eban Ld.

Romer L.J.

it merely intended to repeat the typed name of the firm; and the obvious intention of Mr. Goodman was that it should be regarded as a signature for the purpose of authenticating the letter. If in fact his clients entertained any doubt as to the authenticity of the letter, nothing could be easier than to ask him, by telephone or letter, to confirm it. A manual signature is not necessary either for a will (which is at least as solemn a document as a solicitor's bill of costs) or to satisfy the Statute of Frauds; and provided that the affixing of a name by a rubber stamp complies in other respects with the definition in Stroud to which I have already referred, I see no reason why it should not be sufficient for the purposes of section 65 of the Solicitors Act, 1932. It is true that this Act is a consolidating Act and that in its predecessors the corresponding words were "subscribed with the proper hand of the solicitor," but I do not myself think that much significance can be attached to that phrase in itself. Moreover, although the present Act is a consolidating statute, it is nevertheless the language of section 65, and not that of its forbears, which prescribes the conditions with which solicitors are now required to comply.

The view which I have expressed is supported by the authorities to which the Master of the Rolls has referred. In *Regina* v. *Cowper*[11] the Divisional Court held that the lithographed name of a firm of solicitors was an insufficient "signature" for the purpose of the County Court Rules, 1889, Ord. 6, r. 10, and the Appendix to the Rules, and on appeal[12] Lord Esher M.R. and Fry L.J. were divided in opinion on the point, so that the decision of the Divisional Court stood undisturbed. It is significant, however, that Lord Esher M.R. thought that a mere lithographed name would be sufficient to constitute the solicitor's signature. After pointing out that the whole object of the rule (which, as construed by the court, required the plaintiff's particulars to be signed by his solicitors) was to get the document authenticated as coming from a solicitor's office, he said[13] "if the "solicitor has authorized the issue of the lithograph form that "object is attained. He means it to be his signature and sends "it forth as his, and that seems to me sufficient compliance with "the Act."

I am accordingly of opinion that the defendants fail on their first point; but I wholly agree with the Master of the Rolls that it is far preferable in practice that solicitors should sign their bills, or the letters referring to them, by writing under their own hands, and thus obviate all possibility of justification for disputes such as the present.

---

[11] 24 Q.B.D. 60.

[12] Ibid. 533.

[13] Ibid. 535.

In my judgment, the defendants fail also on their second point, namely, that "Goodman, Monroe & Company" is not the "name" of the plaintiff. The provision in section 65 (2) that, if costs are due to a firm, one of the partners of that firm may sign either in his own name or in the name of the firm is referable, in my opinion, only to a firm which has more than one partner and not to a case such as the present, where one solicitor carries on his profession alone under a firm name. Nevertheless, I can see no objection, either in reason or on the language of the subsection, to such a solicitor signing in conformity with the designation under which he practises. Subject to certain irrelevant exceptions, a man may use whatever name he pleases, and he may prefer one name for some particular purpose and a different name for another. Mr. Charles Goodman's name for professional purposes is "Goodman, Monroe & "Co.," and he is well entitled, in my opinion, to use that designation as his name when signing his bills of costs; and he is within the section in doing so.

For these and for the other reasons which the Master of the Rolls has stated, I agree with him that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *G. Lebor & Co.; Goodman, Monroe & Co.*

B. A. B.

SOLOMONS *v.* R. GERTZENSTEIN LD. AND OTHERS.

1954
Mar. 1, 2, 3, 11.

Lord Goddard C.J.

[1951 S. No. 5061.]

Metropolis—Fire—Precautions—Means of escape in case of fire—Failure to maintain means of escape in efficient working order—Employee of tenant injured in escaping from fire—Breach of statutory duty under London Building Acts (Amendment) Act, 1939 (*c. xcvii*)*—Whether owners and receiver liable—Whether receiver "owner"—Fire caused by short circuit—Defence of accident—Statutory duty—Statute imposing penalty for breach—Statute for benefit of particular class of persons—Whether person injured by breach has right of action—Fires Prevention (Metropolis) Act,* 1774 (14 *Geo.* 3, *c.* 78), *s.* 86*—London Building Acts (Amendment) Act,* 1905 (5 *Edw.* 7, *c. ccix*),

1954

SOLOMONS v. R. GERTZENSTEIN LD.

s. 12—*London Building Acts* (*Amendment*) *Act*, 1939 (2 & 3 *Geo.* 6, *c. xcvii*), *ss.* 33, 35, 133, 148.

Statutory duty—Whether civil right created—Penalty. "Owner."

Section 133 (2) of the London Building Acts (Amendment) Act, 1939, provides that "All means of escape in case of fire . . . "provided in pursuance of . . . this Act or otherwise shall be kept "and maintained in good condition and repair and in efficient "working order by the owner of the building." Section 33 defines owner as meaning in Part V of the Act "the person for the time "being receiving the rackrent of the premises whether on his own "account or as agent or trustee . . ." By section 148 contravention of, or failure to comply with, the provisions of section 133 is an offence for which a penalty is imposed.

A house in Soho was sublet to a number of tenants who carried on a variety of occupations, including manufacturing processes, on the premises, but control of the staircases and passages was retained by the landlords. The rents were collected and the property to a certain extent managed by a receiver who had been appointed in September, 1949, by a building society to whom the landlords had mortgaged their interest. In 1925 the London County Council had required the owners of the building to comply with section 12 of the London Building Acts (Amendment) Act, 1905, which required that a trap-door with a fixed or hinged ladder, or other means of access to the roof be provided. In fact the building had a trap-door leading to the roof and an adequate ladder with hooks was provided, but it was seldom in position and was lying in a passage when, at about 7 p.m. on November 10, 1950, a fire started by a short circuit in the well of the staircase and caused to smoulder a stack of packing paper and cardboard cartons placed on a half landing by the first defendants, tenants occupying rooms on the first floor where they carried on a fur manufacturing business. A sheet of flame suddenly flared up the staircase well and the plaintiff, an employee of a tenant of a second floor room, who had gone to the top floor in search of water, received injuries while escaping through a window. In an action for damages for personal injuries in which the plaintiff alleged negligence against the first defendants, the landlords and the receiver, and breach of section 133 of the Act of 1939 against the landlords and, as the "owner" of the building within the meaning of the section, the receiver:—

Held that (1) The fire had started accidentally, and therefore section 86 of the Fires Prevention (Metropolis) Act, 1774, provided a defence to all the defendants to the plaintiff's claim in negligence. Whether or not the stack of paper was responsible for the spread of the fire, the business of the first defendants necessitated having a stack of wrapping paper, which was not highly inflammable, on hand, and they were not negligent in keeping it on the half landing.

Collingwood v. *Home and Colonial Stores Ld.* (1936) 53 T.L.R. 53; [1936] 3 All E.R. 200; 155 L.T. 550 followed.

(2) The failure to keep the ladder in position was a failure to keep the means of escape in good condition and efficient working

order and was, therefore, a breach of the statutory requirements of section 133 (2) of the Act of 1939.

(3) On the true construction of the Act, "owner" in section 133 bore the same meaning as in section 33, and, therefore, the receiver, as the person receiving the rackrent and as the person deemed, by section 109 of the Law of Property Act, 1925, to be the agent of the mortgagor, was responsible for the consequences of the breach of statutory duty; so also were the landlords who were liable for his acts or defaults.

Watts v. *Battersea Borough Council* [1929] 2 K.B. 63; 45 T.L.R. 224 applied.

(4) The precautions against fire required to be taken and maintained by the London Building Acts were for the benefit of persons working in the particular house in which the local authority required them to be provided, and were to be regarded in the same way as the precautions required to be taken for fencing machinery under the Factories Acts. The case was not therefore one in which the penalty imposed by the London Building Acts (Amendment) Act, 1939, was the only remedy for a breach, and the plaintiff accordingly had a cause of action and was entitled to recover damages against the landlords and the receiver.

Groves v. *Wimborne* (*Lord*) [1898] 2 Q.B. 402; 14 T.L.R. 493 applied.

Pasmore v. *Oswaldtwistle Urban District Council* [1898] A.C. 387; 14 T.L.R. 368 distinguished.

ACTION.

The plaintiff was employed by his brother-in-law who was the tenant of a room on the second floor of an old house in Soho where he carried on the business of a fur manufacturer. The house consisted of a basement, occupied by makers of musical instruments, a ground floor and three floors above. There were a number of tenants carrying on a variety of occupations, including manufacturing processes, in the building. It had a staircase, serving a series of half landings and landings, which was entirely separated from the back wall by a balustrade forming a fence between the landings and the back wall so that there was a well behind the staircase going up to the whole height of the house. The walls were panelled and on the first half landing, a few steps up from the hall, was an aperture in the wall, covered with a grid for ventilation behind which was an air shaft. Panelling was fitted round the grid and electric wires ran down the air shaft.

The space between the first half landing and the wall was covered with wire on which the first defendants, R. Gertzenstein Ld., fur manufacturers, who were tenants of rooms on the first floor, had stacked wrapping paper and corrugated packing material. The second defendants, H. and S. Development Co.

Ld., were the landlords of the building, and had retained control of the staircase and passages. In 1949 they had mortgaged their interest to the Skipton Building Society who, in September, 1949, interest on the mortgage having fallen into arrear, appointed the third defendant, Joseph Edwards, receiver. Thenceforward the receiver by a member of his staff collected the rents and to a certain extent managed the property, visiting the premises from time to time and seeing that certain obligations under the landlords' covenant to keep the entrance and staircase clean and lighted were carried out.

On November 10, 1950, the plaintiff and his brother-in-law had stayed later than the other tenants. Shortly after 7 p.m. the plaintiff came out of the room on the second floor and found smoke ascending from the stack of paper on the first half landing which was on fire though not burning fiercely. He and his brother-in-law ran down with buckets of water and the plaintiff then went up to the lavatory on the top floor to fetch more water while his brother-in-law went to telephone to the fire brigade. A sheet of flame suddenly burst out, reaching the second and third floors. The plaintiff's brother-in-law received serious burns, while the plaintiff on the top floor, seeing that he could not descend the staircase, got out of a window opening on to the back of the house and tried to climb down a pipe. His arm caught in a junction of the pipe and he was suspended by his arm, breaking the bone, and remained in that position for some time before he was finally rescued by the fire brigade.

About February, 1925, the house was the subject of a notice served by the London County Council under section 12 of the London Building Acts (Amendment) Act, 1905, requiring the owners to comply with the section.[1] On the top floor there was a trap door leading to the roof, but, although an adequate ladder with hooks was provided and kept on the premises, it was seldom kept in position and at the time of the fire was lying in one of the passage ways on the top floor leading to the lavatories.

The plaintiff claimed damages alleging negligence against all three defendants, in particular he alleged that the second and third defendants had negligently permitted the accumulation of, and that the first defendants had negligently accumulated, a dangerous quantity of waste paper and highly inflammable material on the level of the first floor and that they had failed to inspect or maintain the electric wiring behind the panelling of the stairs.

The plaintiff further alleged that the second defendants and also the third defendant, as the owner of the building within the meaning of the London Building Acts (Amendment) Act, 1939, were, in failing to keep the ladder in its customary place, in breach of their statutory duty under section 133 (2) of the Act.[1]

The defendants denied liability.

Lord Hailsham Q.C. and *John Perrett* for the plaintiff. Even if the fire started accidentally within the meaning of section 86 of the Fires Prevention (Metropolis) Act, 1774,[2] its spread, which was the cause of the plaintiff's injuries, was due to the negligence of the first defendants in keeping, and of the second and third defendants in permitting them to keep, a quantity of highly inflammable material on the half landing. The Act therefore affords no defence: *Musgrove* v. *Pandelis.*[3] [On this issue reference was made to *Filliter* v. *Phippard*[4]; *Collingwood* v. *Home and Colonial Stores Ld.*[5] and *Rylands* v. *Fletcher.*[6]]

---

[1] London Building Acts (Amendment) Act, 1905, s. 12: "Means of "access to roofs. (1) (A) Every . . . "existing building . . . and (B) Every "new building; shall . . . be pro"vided . . . by the owner with either "(*a*) A dormer window or a door "opening . . . on to the roof with "proper access thereto; or (*b*) A trap "door in a suitable position approved "by the district surveyor . . . and "also with a fixed or hinged step "ladder leading to the roof; or (*c*) "Other proper means of access to the "roof."

London Building Acts (Amendment) Act, 1939, s. 33: "Means of Escape "in Case of Fire—(1) In this Part of "this Act . . . 'owner' in relation to "any premises means the person for "the time being receiving the rack"rent of the premises whether on his "own account or as agent or trustee "for any other person. . . ."

S. 133: "(1) All arrangements and "safeguards for lessening danger "from fire provided in pursuance of "the provisions of the London Build"ing Acts . . . shall be kept and "maintained in good condition and "repair and in efficient working order "by the owner of the building. . . . "(2) All means of escape in case of "fire . . . provided in pursuance . . . "of Part V . . . or otherwise shall be "kept and maintained in good con"dition and repair and in efficient "working order by the owner of the "building and no person shall do or "permit or suffer to be done anything "to impair the efficiency of any such "means of escape. . . ."

S. 148: "(1) . . . the acts or omis"sions specified . . . shall be an "offence against this Act . . . (xxx) "To contravene or fail to comply with "the provisions of section 133 . . . "[penalty] £20 [for each day] £5."

[2] Fires Prevention (Metropolis) Act, 1774, s. 86: ". . . no action, "suit or process whatever shall be "had, maintained or prosecuted "against any person in whose house ". . . or other building, . . . any fire "shall . . . accidentally begin, nor "shall any recompence be made by "any such person for any damage "suffered thereby. . . ."

[3] [1919] 2 Q.B. 43; 35 T.L.R. 299.

[4] (1847) 11 Q.B. 347.

[5] (1936) 53 T.L.R. 53; [1936] 3 All E.R. 200; 155 L.T. 550.

[6] (1868) L.R. 3 H.L. 330.

There was a clear breach of section 133 (2) of the London Building Acts (Amendment) Act, 1939. That section imposes on the "owner" of the building a duty to keep the means of escape in efficient working order. Section 33 defines "owner" in Part V of the Act as the person for the time being receiving the rackrent of the premises. Section 133 contains an express reference back to Part V and both Part V and section 133 are concerned with means of escape in case of fire; "owner" must therefore bear the same meaning in section 133 as it does in Part V. A receiver is the person receiving or entitled to receive the rackrent of the property either on his own behalf or as a trustee, and it therefore follows that the third defendant was the owner of the building within section 133 and the person responsible for seeing that the statutory duty was carried out. Similar words in the Public Health (London) Act, 1891, were held in *Watts* v. *Battersea Borough Council*[7] to cover a solicitor receiving rents.

[LORD GODDARD C.J. If the third defendant is the owner under the Act, what is the position of the second defendants?]

They are the mortgagors vicariously responsible for the acts of the receiver as their agent: section 109 (2) of the Law of Property Act, 1925. They are also liable as the occupiers of the staircase.

Marven Everett Q.C. and *Harry Lester* for the third defendant, on the issue of negligence referred to *Collingwood* v. *Home and Colonial Stores Ld.*[8]

There was no breach of section 133. A trap-door and a ladder with hooks were provided.

[LORD GODDARD C.J. A fixed or hinged ladder was not provided.]

There was no obligation for the ladder to be fixed or hinged. The ladder here, together with the trap-door, came within the requirement "or other means of access to the roof." [Reference was made to section 37 (1) (iii) of the Act of 1939.] The only obligation under section 133 was to keep and maintain the means of access to the roof in good condition; the section contains no reference to keeping a ladder in any particular place. The matter must be looked at from a practical point of view. A suitable ladder was provided, but it could be moved at any time by the tenants, and if they moved it the third defendant cannot be held responsible. In any event the plaintiff never looked for the ladder.

---

[7] [1929] 2 K.B. 63; 45 T.L.R. 224.

[8] (1936) 53 T.L.R. 53; [1936] 3 All E.R. 200.

[LORD GODDARD C.J. He did exactly what anyone with a fire behind him might be expected to do.]

In this class of case it is necessary for the plaintiff to show that the damage was caused by the breach of duty; if there was such a breach the plaintiff has not established that the damage flowed from it.

The third defendant was not the "owner" of the building within the meaning of section 133. The prima facie function of a receiver is to receive rents and profits; his powers and duties are circumscribed by section 109 of the Law of Property Act, 1925, and beyond that he has no duties. It would be remarkable if a receiver were responsible for the provision of means of escape; such a position would be unpracticable, and unless the Act says so in clear words he should not be so regarded. *Watts* v. *Battersea Borough Council*[9] is not a helpful authority in the present case. The Act contemplates other meanings of "owner": see section 141.

Section 148 makes contravention of the provisions of the Act an offence for which a penalty is imposed. The purpose of the Act is for the better regulation of the community of greater London; it is a private Act and not for the benefit of any individual or class of individuals, and, therefore, a breach of duty under it does not give rise to a cause of action: see on this question, *Cutler* v. *Wandsworth Stadium Ld.*[10]

Lord Hailsham Q.C. in reply. The existence of a penalty clause is not conclusive that the civil right of action is taken away.

[LORD GODDARD C.J. If the London County Council requires owners to do something, does that create a duty so that an individual injured by a failure to perform that duty has a right of action?]

The precautions required to be taken are for the benefit of a class of persons—those in the building. A right of action has been held to have been taken away by a penalty clause where the obligation was for the benefit of the public generally: *Passmore* v. *Oswaldtwistle Urban District Council.*[11] The principle applicable to the present case, however, is that in *Groves* v. *Wimborne (Lord)*[12] to the effect that where an act is for the benefit of a class of persons and the penalty for a breach is not adequate compensation, there is a cause of action. [Reference was also made to *Dawson & Co.* v. *Bingley Urban District Council,*[13] *Britannic Merthyr Coal Co. Ld.* v. *David*[14] and *Butler (or Black)* v. *Fife Coal Co.*[15]] In *Monk* v. *Warbey*[16] a severe penalty did not deprive the subject of a right of action. The decision in *Groves* v. *Wimborne (Lord)*[17] was not based on a master and servant relationship; such cases are, on the authorities, in no special position: *Monk* v. *Warbey*[18]; *London Passenger Transport Board* v. *Upson.*[19] Under the Factory Acts a worker may have a right of action against a person who is not his employer. The fact that this is a private Act makes no difference: *Knapp* v. *Railway Executive.*[20] Only in quite different types of cases has it been held that there was no cause of action, never where an Act was for the benefit of persons exposed to danger and they suffered physical damage as a result of a breach of its provisions.

---

[9] [1929] 2 K.B. 63.

[10] [1949] A.C. 398; 65 T.L.R. 170; [1949] 1 All E.R. 544.

[11] [1898] A.C. 387; 14 T.L.R. 368.

[12] [1898] 2 Q.B. 402; 14 T.L.R. 493.

[Reference was made to *Gorris* v. *Scott*[21]; *Pasmore* v. *Oswaldtwistle Urban District Council*[22]; *Cutler* v. *Wandsworth Stadium Ld.*[23]; *Biddle* v. *Truvox Engineering Co. Ld.*[24]; *Clarke and Wife* v. *Brims*[25]; *Badham* v. *Lambs Ld.*[26]; *Phillips* v. *Britannia Hygienic Laundry Co. Ld.*[27]; and *Knapp* v. *Railway Executive.*[28]]

The first and second defendants did not appear and were not represented.

Cur. adv. vult.

March 11. LORD GODDARD C.J. read the following judgment: On the night of November 10, 1950, a disastrous fire occurred at 36, Gerrard Street, Soho, about 7 p.m. There were at the time three persons on the premises: a woman who was suffocated and lost her life, the plaintiff, who was badly injured in trying to escape, and his brother-in-law and employer, who sustained very severe burns. The plaintiff brings this action in respect of the injuries he sustained and I do not pretend that I have found the case otherwise than difficult both as to law and fact. Indeed, the evidence was a great deal less precise than one would have wished, but perhaps this was inevitable and the time which has elapsed since the fire no doubt is to some extent responsible for this state of affairs.

---

[13] [1911] 2 K.B. 149; 27 T.L.R. 308.

[14] [1910] A.C. 74; 26 T.L.R. 164.

[15] [1912] A.C. 149; 28 T.L.R. 150.

[16] [1935] 1 K.B. 75; 51 T.L.R. 77.

[17] [1898] 2 Q.B. 402.

[18] [1935] 1 K.B. 75.

[19] [1949] A.C. 155; 65 T.L.R. 9; [1948] 1 All E.R. 60.

[20] [1949] 2 All E.R. 508.

[21] (1874) L.R. 9 Exch. 125.

[22] [1898] A.C. 387.

[23] [1949] A.C. 398.

[24] [1952] 1 K.B. 101; [1951] 2 T.L.R. 968; [1951] 2 All E.R. 835.

[25] [1947] K.B. 497; 63 T.L.R. 148; [1947] 1 All E.R. 242.

[26] [1946] K.B. 45; 61 T.L.R. 569; [1946] 2 All E.R. 295.

[27] [1923] 2 K.B. 832; 39 T.L.R. 530.

[28] [1949] 2 All E.R. 508.

[His Lordship stated the facts and continued:] Apart from any question of breach of statutory duty, it is necessary for the plaintiff to prove that the fire started or at least spread owing to negligence, otherwise Lord Hailsham conceded, rightly in my opinion, that the Fires Prevention (Metropolis) Act, 1774, would afford a defence. The first thing, therefore, is to determine, if I can, how the fire started. The evidence is, as so often happens in cases of fire, nebulous, and I was invited by Mr. Everett to say that its origin is unexplained. I think, however, that the strong probability is that it was caused by a short circuit set up by the electric wires behind the panelling in the neighbourhood of the ventilator. But how that was caused is a very different matter.

[His Lordship considered the evidence given by the officers of the fire brigade and continued:] In my opinion it was a short circuit that set fire to the wood in the neighbourhood of the ventilator and that in turn set fire to the stack of paper. Pausing here, it does not appear that this paper ever burnt freely; no doubt it caused a lot of smoke, and I accept the evidence that there was some flame seen, but it was not that stack apparently that caused the sudden sheet of flame which caused the real damage here. The cause of that is obscure; the only explanation was that offered by the fire officers, that the heating of the paint and varnish caused an accumulation of gas which suddenly ignited and rushed upwards. However, I do not propose to deal further with this because I cannot hold that placing packing paper and cardboard cartons in this recess behind the balustrade was negligent. Business of the sort carried on by the first defendants necessitates having a stack of packing and wrapping material at hand. This material is not highly inflammable like loose tissue paper or shavings would be. It is common knowledge that it takes a good deal to get closely packed thick paper well alight, though it will smoulder. But in any case I cannot see how it can be negligent to store this paper in what was a convenient recess any more than it would be to store it in one of the rooms occupied by the first defendants. They had no reason to suppose that there was likely to be a short circuit which would fire the panelling in the immediate neighbourhood of the stack, which I may mention was never burnt through. On the evidence before me I am not prepared to find that the fire was caused by the

1954

SOLOMONS v. R. GERTZENSTEIN LD.

Lord Goddard C.J.

negligence of any of the defendants, and I hold that it was accidental and need only refer on this matter to *Collingwood* v. *Home and Colonial Stores Ld.*[1]

I now come to the allegation of breach of statutory duty, which affects both the second and third defendants. It is alleged that there was a breach of section 133 of the London Building Acts (Amendment) Act, 1939, and it is necessary that I should deal with the evidence relating thereto. It seems that about February, 1925, which was long before either the second or third defendants had anything to do with the premises, a notice had been served by the London County Council under section 12 of London Building Acts (Amendment) Act, 1905, requiring the owners of the premises to comply with the section to the satisfaction of the district surveyor. The evidence on this point was given by an officer of the London County Council who had a note of the service of this notice, but no copy of it was produced. He said, however, that that was what the notice would require: that such work as was done was completed in April, 1925, and there was nothing to show that the district surveyor had not been satisfied. Under that section the county council could require that there should be a trap-door in a suitable position constructed in accordance with the provisions of the section, with a fixed or hinged step ladder leading to the roof or other proper means of access to the roof. It was not suggested by either side that there had ever been a fixed or hinged step ladder provided, but that there had been a ladder with hooks on it which could be fixed on to the trap-door. Having no other evidence than that which I have set out, I must assume that this was regarded by the district surveyor as an adequate means of access to the trap-door, and that he was satisfied with the latter. Another witness from the London County Council said that he had surveyed the property about six months before the fire and did so because the factory inspector had called the attention of the council to the premises. He had apparently prepared some survey drawings and he said in his evidence that at the time of his survey there was no ladder giving access to the trap-door. It seems almost inexplicable that a further notice was not served by the county council or some proceedings taken, but there was no evidence that any communication of any sort had been addressed to anyone calling attention to the absence of the ladder. In fact, I find that there was an adequate ladder with hooks provided and kept on the premises, but the ladder was not always, and as I find, only seldom kept in position. It is now known that at the time of the fire it was lying in one of the passageways leading to the lavatories. It is not altogether clear in which passageway it was, nor do I think that it matters. I am satisfied that it was not in position on the day of the fire.

---

[1] (1936) 53 T.L.R. 53; [1936] 3 All E.R. 200; 155 L.T. 550.

The first thing to consider is who is responsible for the consequences, if any, of the disregard of the original requirements of the county council. By the time of the fire the relevant statute was the London Building Acts (Amendment) Act, 1939. Part V of that Act has the cross-heading " Means of Escape in Case of "Fire." An owner is defined by section 33 as meaning the person for the time being receiving the rackrent of the premises whether on his own account or as agent or trustee for any other person. The second defendants admit that they were the landlords of the premises at the material times. In fact they were the owners in equity, having mortgaged their interest to the Skipton Building Society in the year 1949, and on September 27, 1949, the building society appointed the third defendant to be receiver of the income and of the rents and profits of the premises, and at all material times thereafter he acted as receiver. There seems no escape, therefore, from the position that he was for the purposes of Part V of the Building Act the owner of the premises. By section 109 (2) of the Law of Property Act, 1925, the receiver is deemed to be the agent of the mortgagor who is solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides. Section 35 (1) of the Act of 1939 deals with protection against fire in old buildings, and this building is an old building within the meaning of the Act, and the section provides, among other things, that where an old building is a building in which more than 10 persons are normally employed at any one time above the first storey or on or above any storey which is at a greater height than 20 feet the council may at any time serve upon the owner of the building a notice requiring him to provide such means of escape as in the circumstances of the case can be reasonably required, and there is a proviso that the provisions of the subsection shall not apply to any building which has been provided with means of escape in accordance with, among other Acts, the Act of 1905, so long as such means of escape are properly maintained.

Section 133 is in Part XII of the Act, the cross-heading of which is " Miscellaneous." [His Lordship read section 133 (1) and (2) and continued:] I have already said that I am obliged to hold that the receiver is the owner within the meaning of these sections, and it would be impossible to construe the word "owner" in section 133 in any way differently from the construction placed upon it by section 33 as the sections are both dealing with the same matter, namely, means of escape in case of fire. That a receiver can be the owner is, I think, made clear by the reasoning in *Watts* v. *Battersea Borough Council.*[2] Moreover, in the present case, the third defendant did have some duty of management in the sense that it was his duty as representing the landlords and as the agent of the mortgagors to see that the staircase, landings and so forth were kept in good order and, as he told me, he would receive and deal with any complaints from the tenants. I am obliged to find that there had been a fairly consistent disregard of the escape precautions because I am quite satisfied that this ladder was not kept in position though it may have been up from time to time. It was certainly not in position on the night of the fire. If it had been, it is contrary to common sense to suppose that the plaintiff would not have used it and got out on to the roof, from which he might have been rescued with comparative ease, and the same applies to the unfortunate woman who lost her life. I dare say that if the plaintiff had searched about he might have found the ladder, but with the fire raging as it was, and we know the injuries that were inflicted upon his employer one floor down, it is too much to expect that a man will go hunting around to find a ladder and not make use of the first means of escape that occurs to him, hazardous though that means may have been.

The principal question that has been argued on this part of the case is whether the disregard of the statutory requirements, because on my findings neither safeguards nor means of escape were kept in good condition or efficient working order, gives a cause of action to the plaintiff or whether, as a penalty is provided in the Act, that is the only remedy which is available. On this point a large number of cases were cited, but I do not think it necessary to burden this judgment by setting all of them out. There are cases both ways, some giving a remedy by action, others holding that the only remedy is to prosecute for the penalty or to enforce the obligation in the particular manner prescribed by the Act. I will briefly, however, refer to *Pasmore* v. *Oswaldtwistle Urban District Council*,[3] where the Earl of Halsbury L.C.[4] quoted with approval what Lord Tenterden C.J. said in *Doe* v. *Bridges*[5]: "where an Act creates an obligation and "enforces the performance in a specified manner, we take it to be "a general rule that performance cannot be enforced in any "other manner," and Lord Macnaghten said[6]: "Whether the "general rule is to prevail, or an exception to the general rule is "to be admitted, must depend on the scope and language of the "Act which creates the obligation and on considerations of policy "and convenience." It is worth noticing that that case dealt with the duty of a local authority to make sewers, and the decision was that that duty could not be enforced by an action for mandamus at the suit of a private person; the only remedy being a complaint to the local government board. That case, of course, deals with a wholly different state of affairs than we find in the present case, where obviously the precautions to be taken and maintained are for the benefit of the people who may be working in the particular house in which the local authority have required them to be provided. I can see no reason why these precautions are not to be regarded in exactly the same way as the precautions required to be taken for fencing machinery and so forth under the Factories Acts. A person injured by a disregard of the statutory requirements has a right of action although the factory owners are at the same time liable to a penalty. The reasoning in *Groves* v. *Wimborne (Lord)*[7] always regarded as the leading case on this subject, seems to me to be eminently applicable to the present case. One of the factors which entitled the London County Council to call for adequate means of escape is the number of people working on the premises, and there can be no doubt that by reason of some of the work which was carried on there the premises fell within the definition of a factory under section 151 of the Factories Act, 1937. I can see no reason, therefore, why a person injured because the means of escape were not maintained in proper working order should not have a cause of action. The principle which I would endeavour to state is that, where a duty imposed by the Act is intended for the benefit of the public generally, a right of action is not given to an individual who may suffer an injury from its breach, but where the duty is imposed for the benefit of a particular ascertainable class, such as workers in a building, anyone injured as a result of the breach has a right of action. It does not seem to me that it necessarily follows that if the London County Council required certain precautions to be taken

---

[2] [1929] 2 K.B. 63; 45 T.L.R. 224.

[3] [1898] A.C. 387; 14 T.L.R. 368.

[4] [1898] A.C. 387, 394.

---

[5] (1831) 1 B. & Ad. 847, 859.

[6] [1898] A.C. 387, 397.

[7] [1898] 2 Q.B. 402; 14 T.L.R. 493.

1954

SOLOMONS
v.
R. GERTZENSTEIN LD.

Lord Goddard C.J.

in such places of public resort as theatres or a stadium or large exhibition hall, that if a fire took place and persons were injured every one of them would have a cause of action. It is not necessary to decide this, but it seems to me there may be a considerable difference between the public who resort or are invited to resort to such places and workers in a building in which precautions are ordered to be taken for the benefit of those workers.

For these reasons I am of opinion that the plaintiff has a cause of action against the third defendant as the owner of the premises and also for what it is worth against the second defendants who are liable for his acts or defaults.

[His Lordship considered the evidence relating to damages and continued:] I think that in all the circumstances £750 is a fair sum to award as general damages. Special damages together with the loss of property amount to £650 and there will, therefore, be judgment for the plaintiff for £1,400.

Judgment for the plaintiff.

Solicitors: *Herbert Baron & Co.; Spiro & Steele.*

J. F. L.

1954
Mar. 29.

Lord Goddard C.J., Hilbery and Hallett JJ.

REGINA *v.* EVENING STANDARD CO. LD.

Contempt of Court—Report of judicial proceedings—False report—Trial for murder—Honest mistake by reporter—Publication in good faith —Interference with course of justice—Liability of editor and proprietors—Vicarious liability.

The publication of comments on cases before they are tried, or alleged histories of a prisoner on trial, or of a false or mistaken report of proceedings in court are an interference with the due course of justice which the court in the exercise of its summary jurisdiction will prevent and punish, whether such interference is intentional or not; and in such cases the principle of vicarious liability applies.

Where, therefore, owing to an unintentional mistake by the reporter, a London evening newspaper's report of a trial for murder, printed in good faith by the editor who had no reason to suppose it incorrect, inaccurately attributed to one witness evidence which had not, in fact, been given at the trial at all and which was highly prejudicial to the accused:—

Held, that the report constituted a serious interference with the due course of justice for which not only the reporter but also the editor and proprietors were responsible, but that, since the reporter had had no intention of interfering with the course of justice and no moral blame could be attached to the editor, there were mitigating circumstances and the court would not inflict separate penalties upon the reporter and editor but would impose a fine upon the proprietors.

St. James's Evening Post (1742) 2 Atk. 469 followed.

Observations of Lord Russell and Wright J. in *Regina* v. *Payne* [1896] 1 Q.B. 577, 580, 582; 12 T.L.R. 321 explained.

Application for a writ of attachment.

On February 23, 1954, a prisoner was indicted at Chelmsford Assizes for the murder of his wife, who had been dead for a considerable time before his arrest and whose body was discovered in a trunk which the prisoner had caused to be moved with his effects. Part of the case for the Crown, as tending to establish guilt, was that the prisoner had told many lies and made mis-statements with regard to the disappearance of his wife. To that effect two witnesses were called, a Miss Briggs and a Mrs. Darmody. Miss Briggs gave evidence to the effect that the prisoner had told her that he was unmarried, and Mrs. Darmody said in evidence that he had told her that he had been married but that his wife had died.

That evening there appeared on the front page of the Final Night Extra edition of the "Evening Standard," on sale in Chelmsford on the same evening, a large headline, "Trunk Trial "Story of Marriage Offer—Husband is Accused." Below the headline was a report of the trial headed "Evening Standard "Reporter, Chelmsford, Tuesday," and continuing: "Mrs. "Gertrude Darmody, of Spitalfields, Norwich, said at the assizes "here that a man accused of murdering his wife asked her to "marry him. 'He told me he was not married. After I had "'seen him in the same public house again and he had asked "'me to marry him I asked him to show me his army pay "'book.'" On the back page was a headline "Accused man "'Asked me to Marry.'"

In fact, Mrs. Darmody had not given that evidence. Miss Briggs had given evidence before the examining justices that the prisoner had, after the death of his wife, asked her to marry him; but at the trial, when Miss Briggs had just begun to give evidence the judge ruled, after a discussion in the absence of the jury, that that part of her evidence should not be given as it was highly prejudicial to the prisoner; and no such evidence was given at the trial.

The report had been compiled from information telephoned to the " Evening Standard " office in London by George Forrest, the reporter attending the trial, who had also been present at the proceedings before the examining justices. At the trial the reporter had left the court during the discussion as to the admissibility of part of Miss Briggs' evidence to telephone his account of the earlier part of the trial and he returned to the court just after she had completed her evidence.

The report was mentioned to the trial judge on the next morning, but counsel for the defence did not press for a new trial owing to the difficulty of empanelling a jury who had not seen the report. In fact the jury found the prisoner not guilty and he was acquitted.

The Attorney-General applied for leave to issue a writ of attachment against the Evening Standard Co. Ld., the editor of the " Evening Standard " and the reporter.

According to an affidavit filed by the editor the reporter had for 10 years been a trusted reporter on the staff of the newspaper and had previously reported many trials without any complaint as to the accuracy of his reports, and had proved himself a thoroughly competent and reliable reporter. He had thought the report perfectly accurate and genuine and he and the proprietors had published it in good faith.

The reporter was unable to explain how he had made the mistake. According to an affidavit filed by him he had understood Mrs. Darmody to say that the prisoner had made her an offer of marriage and he had written " Marriage, yes " in his notebook.

Sir Reginald Manningham-Buller Q.C., S.-G. and *J. P. Ashworth* for the Attorney-General. Any juror leaving the Assize Court could have bought a copy of the " Evening Standard " and read in it something which was not said in court and which was highly prejudicial to the prisoner. The publication of this report, in that it tended or was calculated to interfere with the due course of justice and to prejudice the criminal proceedings then being carried on, was a very serious contempt of court for which the newspaper proprietors, the editor and the reporter are clearly responsible.

Sir Hartley Shawcross Q.C. and *Helenus Milmo* for the newspaper proprietors and the editor. This is an unusual case, for generally when newspapers fall into error it is through some fault in the editorial offices. In the present case the newspaper published a story received from a reliable and experienced reporter;

the editor thought that the message received from the reporter was perfectly correct and genuine and he published it in good faith, as did the proprietors. It is recognized that it is a well-established principle of journalism that editors and proprietors are responsible for what is published in their newspapers, and full responsibility for the publication of the report is accepted; the proprietors and the editor apologize and express their extreme regret to the court for the occurrence.

But although their high degree of responsibility is recognized, the editor and the proprietors cannot be held vicariously liable for a contempt into which they had been led by their reporter. The proceedings being criminal, contempt of court cannot be committed without a guilty mind, and the offence cannot be one of absolute obligation. The authorities are conflicting: in *Regina* v. *Payne* [1] Lord Russell of Killowen said [2] that to amount to contempt what was published must be something "which either "is clearly intended, or at least is calculated, to prejudice a "trial which is pending." In *Ex parte Jones* [3] it was held that ignorance of the contents of a pamphlet would not excuse the printer, but it is submitted that the word "calculated," as used by Lord Russell, involves an element of mens rea. Its general meaning, especially before the idea of absolute obligation existed in the law, imputes some wrongful intent. In the present case that is lacking. No moral blame can be attached to either the proprietors or to the editor, and vicarious criminal liability ought not to be visited upon them.

G. D. Roberts Q.C. and *T. G. Roche* for the reporter. The reporter must have either misheard or misunderstood what was being said at the trial. Extreme and unqualified regret for the mistake is expressed to the court and a humble and sincere apology tendered. Nothing could have been further from the reporter's mind than intentionally to report something which was not said.

Sir Reginald Manningham-Buller Q.C. in reply. The words of Wright J. in *Regina* v. *Payne*,[4] "If the publication is found to "be likely to interfere with a fair trial," show that "calculated" and "intended" must be given different meanings.

[LORD GODDARD C.J. The test is whether the publication is likely to interfere with a fair trial.]

---

[1] [1896] 1 Q.B. 577; 12 T.L.R. 321.

[2] [1896] 1 Q.B. 577, 580.

[3] (1806) 13 Ves. 237.

[4] [1896] 1 Q.B. 577, 582.

[Hallett J. In *Rex* v. *Editor of the Daily Mail*[5] the court refused to act. A distinction must be drawn between an intention and a probable effect.]

The result of the publication of an inaccurate report in the present case might have been very serious.

Lord Goddard C.J. In this case the Solicitor-General moves for a writ of attachment to issue against the editor of the "Evening Standard," the Evening Standard Co. Ld., and one Forrest, a reporter, in respect of matter which was published in the "Evening Standard" on February 23 of this year which purported to be a report of the trial of a man charged with the murder of his wife. The fact that the prisoner was acquitted of the murder is neither here nor there: fortunately no damage was done to him, although that is not a matter which concerns the court, because the question is one of much more far-reaching importance than that.

[His Lordship stated the facts and continued:]

How did this extraordinary and most reprehensible state of affairs come about? It seems that the system of the reporter, who had also been present at the magistrates' court, was to take some notes in court and then go from the court to a telephone box to telephone his account to London, and then to go back to court and resume reporting, and to go out and telephone again. It is not for this court to tell newspapers how they are to conduct their business, still less to instruct reporters how they are to report; but that method can, I think, perhaps explain how it is that mistakes get into reports which are sent. The reporter in this case took the barest notes and then went to the telephone box and telephoned his account, by his recollection, I suppose, and what he had got in his notes. He was in court when Miss Briggs gave her evidence. She started her evidence and then, after a very short time and after a very few questions, the judge intervened and the discussion took place between the judge and counsel. That apparently not being of any great interest to a reporter he left the court and telephoned to London, returning to court as Miss Briggs finished giving evidence. His next telephone message was this: "The witness who followed her into the box was Mrs. Gertrude Darmody, of 55 Spitalfields, Norwich. She said that she "met Kemp the accused in a public house there in September "last year." So far that was true. "'He told me he was

---

[5] (1928) 44 T.L.R. 303.

"'not married'"; that was true also. "'After I had seen "'him in the same public house again and he had asked me to "'marry him I asked him to show me his army pay book.'" The words "I asked him to show me his army pay book" were accurate. The statement "After I had seen him in the same "public house again and he had asked me to marry him" was, of course, wholly inaccurate. He then went on with a short résumé of the rest of her evidence. Consequently the public at Chelmsford, including members of the jury, who are no longer locked up when the court has risen, could buy this newspaper and see that there had been an offer of marriage made by the prisoner to this witness when in fact no offer had been made.

How comes it that this inaccurate statement, a most prejudicial statement, was published? It was suggested that it was a mishearing. I do not think that there could possibly have been any question of mishearing. The reporter had been present at the magistrates' court and it seems to the court that the most probable explanation, and the inference which should be drawn, is that the reporter, in going in and out of court, listening to the evidence of one witness and not listening perhaps to the evidence of another, had at the back of his mind what he had heard before the magistrates. Miss Briggs' evidence he had telephoned up to London as evidence of no moment, but he had been in court while Mrs. Darmody had given evidence that she had asked the prisoner if he was married; he remembered that at some time something was said in the magistrates' court about an offer of marriage; and, having that at the back of his mind he inaccurately and most carelessly telephoned what he thought the witness had said.

This is surely a proper matter to bring before this court. It is just as well that the nature of the jurisdiction which this court exercises on these occasions with regard to reports of trials in newspapers should be understood. It is called contempt of court, and that is a convenient expression because it is akin to a contempt. But the essence of the jurisdiction is that reports, if they contain comments on cases before they are tried, or alleged histories of the prisoner who is on trial—such as in the case of the *Daily Mirror* (*Rex* v. *Bolam, ex parte Haigh* [1]), in which this court had to intervene about five years ago—and all misreports are matters which tend to interfere with the due course of justice. The foundation of the jurisdiction

---

[1] (1949) 93 S.J. 220.

1954

REGINA
v.
EVENING
STANDARD
CO. LD.

Lord Goddard
C.J.

is that such reports are an interference with the due course of justice, and one of the earliest cases, if not the earliest, in which this jurisdiction was invoked was in 1742, in a case known as *The St. James's Evening Post*,[2] before that great judge, Lord Hardwicke L.C. In that case there was a motion to commit an editor for publishing a libel upon a litigant and it was objected that it was not a matter for the summary jurisdiction of the court because there was a remedy at law for libel. Lord Hardwicke pointed out that he was dealing with the matter of the publication of a libel upon a litigant in a case which had not then come to a conclusion or been heard. He started his judgment by saying[3]: "Nothing is more incumbent "upon courts of justice, than to preserve their proceedings from "being misrepresented;"—that is, of course, what has happened here—"nor is there any thing of more pernicious consequence, "than to prejudice the minds of the publick against persons con-"cerned as parties in causes, before the cause is finally heard." After rejecting the argument that he could not deal summarily with the case because there was a remedy at law, he considered the different sorts of contempt. The last one was[4]: "There may "be also a contempt of this court, in prejudicing mankind "against persons before the cause is heard. There cannot be any "thing of greater consequence, than to keep the streams of "justice clear and pure, that parties may proceed with safety "both to themselves and their characters."

That is the foundation of the jurisdiction which this court has exercised for more than 200 years, and is the reason why the court will intervene to prevent and punish the publication of improper information before a case is heard or the dissemination of improper information about a case which is to be heard or is not fully heard or of false reports or misrepresentation of the proceedings in a court.

We have said, perhaps more frequently in recent years, that the summary jurisdiction of this court should only be invoked and will only be exercised in cases of real and serious moment; and have deprecated in certain cases a motion to attach where there has not really been a serious interference with justice. This case might have been a disastrous interference with justice; but, as Lord Hewart C.J. said in *Rex* v. *Editor of the New Statesman*,[5] the gravity of the penalty or sanction which the court

[2] (1742) 2 Atk. 469.

[3] Ibid.

[4] Ibid. 471.

[5] (1928) 44 T.L.R. 301, 303.

1954

REGINA
v.
EVENING
STANDARD
CO. LD.

Lord Goddard
C.J.

will impose must depend upon the circumstances of each particular case. If a comment is gratuitously published either in a newspaper or in any other form of public dissemination, this court would not hesitate to impose a severe penalty, and even, as in the recent case of the *Daily Mirror*,[6] to inflict the penalty of imprisonment. In this case, however, I am glad to be able to come to the conclusion that there was here no intentional interference with the course of justice. I cannot believe that the reporter for a moment deliberately or intentionally sent out false information. He, as a responsible journalist, would know that doing so would land him in the gravest possible difficulty. Nor can one attach moral blame, if I may use that expression, to the editor, who had no reason to suppose that a reporter of the " Standard " had sent him information in an inaccurate form. There are, therefore, mitigating circumstances, and one can only be thankful that the matter did not react unfavourably on the prisoner, though, as I have said, whether it reacts favourably or unfavourably upon the prisoner is not the test.

Sir Hartley Shawcross said that, while his clients desired to abide by the well understood rule of journalism that the editor and proprietors of papers must in a case such as this take responsibility, he would suggest to the court that vicarious liability, as it is called, ought not in law to be visited upon them and that they ought not to be made vicariously liable for the mistake or misconduct of the reporter. I do not think that we can possibly agree with that submission, which seems contrary to what Lord Russell and Wright J. said in *Regina* v. *Payne*,[7] where they pointed out that the court would interfere where the publication was intended or calculated or likely to interfere with the course of justice. Wright J.[8] used the word " likely," Lord Russell[9] used the word " calculated." Indeed, it goes further than that, because in the case of *St. James's Evening Post*,[10] to which I previously referred, Lord Hardwicke, who was asked not to punish the publisher because[11] " she did not know the nature of the paper; and that " printing papers and pamphlets, is a trade, and what she gets her " livelihood by," said[12]: " But, though it is true, this is a trade, " yet they must take care to do it with prudence and caution; " for if they print anything that is libellous, it is no excuse, to

---

[6] 93 S.J. 220.

[7] [1896] 1 Q.B. 577; 12 T.L.R. 321.

[8] [1896] 1 Q.B. 577, 582.

[9] Ibid. 580.

[10] 2 Atk. 469.

[11] Ibid. 471.

[12] Ibid. 472.

"say, that the printer had no knowledge of the contents, and "was entirely ignorant of its being libellous; and so is the rule "at law, and I will always adhere to the strict rules of law in "these cases."

The court has now to consider what penalties it should impose. We must impose a substantial penalty because, although the case may be the result of misadventure, mistake or whatever one likes to call it, it is a very grave mistake and one which might have done incalculable harm. We do not propose to impose any penalty upon the editor because he had no reason to suppose that the report telephoned to him by the reporter was otherwise than accurate. I have already said that the principle of vicarious liability is well established in these cases and must be adhered to. We have had some doubt as to what we should do in the case of Mr. Forrest. As I have already said, he made an honest mistake, that is to say, he did not deliberately send up that which he knew to be untrue; but, perhaps owing to ill-health or other reasons, he had a confused idea in his mind. I hope that in future what I have said about the risk of sending reports up in the way which I have described will be carefully considered. We are not therefore going to impose a separate penalty on Mr. Forrest, but shall order the Evening Standard Company to pay a fine to the Crown of £1,000 and the costs of these proceedings. The fine must be paid within 48 hours.

Defendants adjudged Guilty of contempt. Order that Evening Standard Co. Ld. pay £1,000 fine.

Solicitors: *Treasury Solicitor; Allen & Overy; Withers & Co.*

J. F. L.

1953
Nov. 20.

Streatfeild J.

REGINA *v.* SHEER METALCRAFT LD. AND ANOTHER.

Statutory Instrument—Notice to public—Certificate—Sale of goods in excess of Schedule—Absence of certificate exempting from printing —Validity—Statutory Instruments Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 36), *ss.* 2, 3—*Statutory Instruments Regulations,* 1947 (*S.I.* 1948, *No.* 1), *reg.* 7.

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

A statutory instrument, made by a Minister or other competent authority, is valid and effective as soon as it is made, or where it is required to be laid before Parliament, as soon as that has been done, notwithstanding that the provisions of the Statutory Instruments Act, 1946, and the regulations made thereunder[1] relating to the printing and issuing of statutory instruments have not been complied with.

TRIAL ON INDICTMENT at Kingston-upon-Thames Assizes.

The accused, Sheer Metalcraft Ld. and their managing director, Albert Rustin, were charged on an indictment containing fourteen counts of infringements of the Iron and Steel Prices Order, 1951 (S.I. 1951, No. 252). It was contended on behalf of the accused that this was not a valid statutory instrument in that the schedules thereto, which were an integral part of it, had not been printed with the instrument when it was printed by the Queen's Printer, as required by the Statutory Instruments Act, 1946, s. 2 (1), although the Minister had not certified under regulation 7 of the Statutory Instruments Regulations, 1947, that such printing was unnecessary. It was submitted for the Crown that that omission did not invalidate the instrument, but merely put the Crown to proof that the purport of the instrument had been brought to the notice of the public or of those likely to be affected by it or of the person charged. The court ruled on those submissions before evidence was heard relating to the alleged commission of the offences charged and to the steps taken by the Crown to promulgate the instrument in question.

---

[1] Statutory Instruments Act, 1946: "2 (1) Immediately after the "making of any statutory instrument, "it shall be sent to the King's "printer of Acts of Parliament and "numbered in accordance with regu"lations made under this Act, and "except in such cases as may be pro"vided by any Act passed after the "commencement of this Act or pre"scribed by regulations made under "this Act, copies thereof shall as "soon as possible be printed and sold "by the King's printer of Acts of "Parliament."

"3 (1) Regulations made for the "purposes of this Act shall make "provision for the publication by His "Majesty's Stationery Office of lists "showing the date upon which every "statutory instrument printed and "sold by the King's printer of Acts "of Parliament was first issued by "that office. . . .

"(2) In any proceedings against "any person for an offence consisting "of a contravention of any such "statutory instrument, it shall be a "defence to prove that the instru"ment had not been issued by His "Majesty's Stationery Office at the "date of the alleged contravention "unless it is proved that at that "date reasonable steps had been "taken for the purpose of bringing "the purport of the instrument to the "notice of the public, or of persons "likely to be affected by it, or of the "person charged.

"(3) Save as therein otherwise "expressly provided, nothing in this "section shall affect any enactment "or rule of law relating to the time "at which any statutory instrument "comes into operation."

"8 (1) The Treasury may, with the "concurrence of the Lord Chancellor "and the Speaker of the House of "Commons, by statutory instrument "make regulations for the purposes "of this Act, and such regulations "may, in particular:—(c) provide "with respect to any classes or "descriptions of statutory instrument "that they shall be exempt, either "altogether or to such extent as may "be determined by or under the "regulations, from the requirement of "being printed and of being sold by "the King's printer of Acts of Par"liament, or from either of those "requirements."

Statutory Instruments Regulations, 1947, reg. 7: "If the responsible autho"rity considers that the printing and "sale in accordance with the require"ments of subsection (1) of section 2 "of the principal Act of any Schedule "or other document which is identi"fied by or referred to in a statutory "instrument and would, but for the "provisions of this regulation, be "required to be included in the in"strument as so printed and sold, is "unnecessary or undesirable having "regard to the nature or bulk of the "document and to any other steps "taken or to be taken for bringing "its substance to the notice of the "public, he may, on sending it to the "King's printer of Acts of Parlia"ment, certify accordingly; and any "instrument so certified shall, unless "the Reference Committee otherwise "direct under these regulations, be "exempt from the requirements afore"said so far as concerns the document "specified in the certificate."

George Pollock Q.C. and *R. D. Du Cann* for the accused.
Melford Stevenson Q.C. and *Edward Clarke* for the Crown.

Case cited in argument: *Simmonds* v. *Newell.*[2]

STREATFEILD J. This matter comes before the court in the form of an objection to the admissibility in evidence of a statutory instrument known as the Iron and Steel Prices Order, 1951. It appears that part and parcel of that instrument consisted of certain deposited schedules in which maximum prices for different commodities of steel were set out. The instrument is said to have been made by the Minister of Supply on February 16, 1951; laid before Parliament on February 20, 1951; and to have come into operation on February 21, 1951. It is under that statutory instrument that the present charges are made against the two defendants in this case.

The point which has been taken is that by reason of the deposited schedules not having been printed and not having been certified by the Minister as being exempt from printing, the instrument is not a valid instrument under the Statutory Instruments Act, 1946. That point was taken in *Simmonds* v. *Newell,*[2] but it was expressly left open in view of a certain admission then made by the Solicitor-General, which, however, does not apply to the present case. The point arises in this way: under regulation 55AB of the Defence (General) Regulations, 1939, as amended, a competent authority, which in this case is the Minister of Supply, may by statutory instrument provide for controlling the prices to be charged for goods of any description or the charges to be made for services of any description, and for any incidental and supplementary matters for which the competent authority thinks it expedient for the purposes of the instrument to provide. It is said in the statutory instrument here that it was made in exercise of the powers conferred upon the Minister by regulations 55AB and 98 of the Defence (General) Regulations, and other statutory authorities.

---

[2] [1953] 1 W.L.R. 826; [1953] 2 All E.R. 38.

The contention is that the making of that instrument is governed by the provisions of the Statutory Instruments Act, 1946, which repeals and simplifies the more cumbrous procedure under the Rules Publication Act, 1893.

[His Lordship read sections 1 and 2 of the Act of 1946 and regulation 7 of the Statutory Instruments Regulations, 1947, and continued:] Section 1 visualizes the making of what is called a statutory instrument by a Minister of the Crown; section 2 visualizes that after the making of a statutory instrument it shall be sent to the King's Printer to be printed, except in so far as under regulations made under the Act it may be unnecessary to have it printed. It is said here that the Minister did not certify that the printing of these very bulky deposited schedules was unnecessary within the meaning of regulation 7. It is contended, therefore, that as he did not so certify it, it became an obligation under the Act that the deposited schedules as well as the instrument itself should be printed under section 2 of the Act of 1946, and in the absence of their having been printed as part of the instrument, the instrument cannot be regarded as being validly made.

To test that matter it is necessary to examine section 3 of the Act of 1946. By subsection (1): "Regulations made for the "purposes of this Act shall make provision for the publication "by His Majesty's Stationery Office of lists showing the date "upon which every statutory instrument printed and sold by the "King's printer of Acts of Parliament was first issued by that "office. . . ." There does not appear to be any definition of what is meant by "issue," but presumably it does mean some act by the Queen's Printer of Acts of Parliament which follows the printing of the instrument. That section, therefore, requires that the Queen's Printer shall keep lists showing the date upon which statutory instruments are printed and issued.

1953

REGINA
v.
SHEER
METALCRAFT
LD.

Streatfeild J.

Subsection (2) is important and provides: "In any proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument had not been issued by His Majesty's Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged."

It seems to follow from the wording of this subsection that the making of an instrument is one thing and the issue of it is another. If it is made it can be contravened; if it has not been issued then that provides a defence to a person charged with its contravention. It is then upon the Crown to prove that, although it has not been issued, reasonable steps have been taken for the purpose of bringing the instrument to the notice of the public or persons likely to be affected by it.

I do not think that it can be said that to make a valid statutory instrument it is required that all of these stages should be gone through; namely, the making, the laying before Parliament, the printing and the certification of that part of it which it might be unnecessary to have printed. In my judgment the making of an instrument is complete when it is first of all made by the Minister concerned and after it has been laid before Parliament. When that has been done it then becomes a valid statutory instrument, totally made under the provisions of the Act.

The remaining provisions to which my attention has been drawn, in my view, are purely procedure for the issue of an instrument validly made—namely, that in the first instance it must be printed by the Queen's Printer unless it is certified to be unnecessary to print it; it must then be included in a list published by Her Majesty's Stationery Office showing the dates when it is issued and it may be issued by the Queen's Printer of Acts of Parliament. Those matters, in my judgment, are matters of procedure. If they were not and if they were stages in the perfection of a valid statutory instrument, I cannot see that section 3 (2) would be necessary, because if each one of those stages were necessary to make a statutory instrument valid, it would follow that there could be no infringement of an unissued instrument and therefore it would be quite unnecessary to provide a defence to a contravention of any such instrument. In my view the very fact that subsection (2) of section 3 refers to a defence that the instrument has not been issued postulates that the instrument must have been validly made in the first place otherwise it could never have been contravened.

In those circumstances I hold that this instrument was validly made and approved and that it was made by or signed on behalf of the Minister on its being laid before Parliament; that so appears on the face of the instrument itself. In my view, the fact that the Minister failed to certify under regulation 7 does not invalidate the instrument as an instrument but lays the burden upon the Crown to prove that at the date of the alleged contraventions reasonable steps had been taken for bringing the instrument to the notice of the public or persons likely to be affected by it. I, therefore, rule that this is admissible.

[When evidence of the steps taken to bring the instrument to the notice of the public and of the contravention of it by the accused had been given, His Lordship summed up and the jury, after a retirement of two minutes, found both the accused guilty on all counts.]

Verdict: Guilty on all counts.

Solicitors: *Peters & Peters; Treasury Solicitor.*

HARVELL v. FOSTER AND ANOTHER.

[1952 H. No. 1442.]

1954
Mar. 9, 12.

Lord
Goddard C.J.

Administrator—Administration bond—Will—Cesser of liability—Estate wound up and residue in hands of administrator — Failure of administrator to pay residue to residuary legatee—Whether sureties liable under bond.

By his will a testator gave all his estate to the plaintiff, his daughter, and appointed her sole executrix. Being under age at the date of her father's death, the plaintiff elected for her husband to be appointed administrator and guardian during her minority, and he entered into a bond, with the defendants as his sureties, for the due administration of the estate. The defendants, who were solicitors, having been instructed by the plaintiff to prove her father's will, paid the debts, funeral and testamentary expenses and, after deducting their costs, paid the balance of the estate, amounting to about £1,000, to the husband as administrator. Differences having arisen between the plaintiff and her husband, they parted, and the plaintiff lost all trace of him. Apart from one sum of £300, the husband failed to account for the residue of the estate to the plaintiff. In an action by the plaintiff as assignee of the bond against the defendants as sureties:—

Held, that the object of the bond was to ensure the due winding up of the estate, and once the residue was in the hands of the administrator, his character changed from that of administrator to that of trustee, at which stage the defendant's obligations under the bond ceased and, therefore, they were not liable to the plaintiff.

In re Ponder [1921] 2 Ch. 59 applied.

Dobbs v. *Brain* [1892] 2 Q.B. 207; 8 T.L.R. 630 distinguished.

ACTION.

The plaintiff, Anne Elizabeth Harvell, claimed as assignee of an administration bond, £699 13s. 9d., from the defendants, Robert Tonge Foster and John Michael Maidlow Davis, solicitors, who were made sureties under the bond for the due administration of the estate of the plaintiff's father, William George John Askew, who died on February 8, 1948.

By his will dated October 24, 1947, the testator gave all his estate to the plaintiff and appointed her sole executrix. On April 22, 1948, the plaintiff, then aged 18, married Don Eric Harvell, and in May, 1949, she instructed the defendants, who practised as solicitors under the style of Chanter, Barrington and Foster, to prove her father's will. As she was under age, she elected for her husband to be appointed administrator and guardian until she attained the age of 21. Letters of administration were accordingly granted to him on June 13, 1949, a bond dated May 26, 1949, having been entered into by him for the due administration of the estate according to law.

The condition of the bond, to which the defendants were made parties, was that if the husband " do, when lawfully called on in " that behalf, make or cause to be made a true and perfect " inventory of the said estate which has or shall come to the " hands, possession, or knowledge of the said intended adminis- " trator, and the same so made do exhibit or cause to be exhibited, " into the Principal Probate Registry . . . , whenever required by " law so to do. And the said estate do well and truly administer " according to law. And further do make or cause to be made a " true and just account of the administration of the said estate " whenever required by law so to do, then this obligation to be " void and of none effect, . . ."

By July 11, 1949, the defendants had received £1,300, being the purchase money for the cottage in which the testator lived, and 19s. 4d. from the Post Office Savings Bank. They accounted for duty, paid the debts, funeral and testamentary expenses, and, after deducting their costs, paid to the husband as administrator

£950 on account. With £350 of this money the husband bought a van which was registered in the joint names of the husband and the plaintiff.

By August, 1949, relations between the plaintiff and the husband had become strained, and on that day he turned her out of the house, put her on a train to London, giving her £300 out of her money. On August 24, 1949, the defendants sent the balance of the estate, amounting to £49 13s. 9d., to the husband, together with a full account of all the moneys which they had received and payments made. Thereafter, the husband disappeared and the plaintiff has been unable to find him.

On January 25, 1952, the bond was duly assigned to the plaintiff by an order of the Probate Division, and she now claimed against the defendants on the bond, on the ground that the husband had not duly administered the estate; that he was liable on the bond, and that they were liable as his sureties.

Harold Christie Q.C. and *C. E. Rochford* for the plaintiff. The defendants are liable on the bond on the authority of *Dobbs* v. *Brain.*[1] When there is an infant interested there is only one method under the Administration of Estates Act, 1925, s. 42, by which the administrator can get rid of his liability, namely, by appointing trustees and handing over the estate to them. Here, the husband not having done that, he is thrown back to the position before 1925. [*In re Salomons*[2] was referred to.]

Pascoe Hayward Q.C. and *John Monckton* for the defendants. The administration of the estate is complete as soon as the estate is clear, that is, as soon as the debts, duties and legacies are paid. Once the estate has been cleared and the administrator has it in his hands, he ceases to be an administrator and becomes a trustee of the estate for the beneficiary. There is then no further act of administration to perform, and the handing over of the estate is done, not as administrator, but as trustee: *In re Ponder.*[3] That case decided that, for the purpose of appointing new trustees, administration is over as soon as the residue is ascertained. Once the administration is over, the condition of the bond is fulfilled. Unless administration was closed the court would not appoint trustees. If the position were otherwise, in the case of complicated trusts the bondsmen might be bound for 50 years. [*In re Yerburgh*[4] and *Eaton* v. *Daines*[5] were referred to.]

---

[1] [1892] 2 Q.B. 207; 8 T.L.R. 630.

[2] [1920] 1 Ch. 290.

[3] [1921] 2 Ch. 59.

[4] [1928] W.N. 208.

[5] [1894] W.N. 32.

[LORD GODDARD C.J. Here the plaintiff is saying that the defendants are trustees for her, which is not true.]

If *In re Ponder* [6] is accepted one must arrive at the conclusion that the estate is complete and, therefore, that the administration is over. If the plaintiff is right, the bondsmen are liable down to the ultimate distribution. In *In re Smith* [7] it was held that under section 43 of the Conveyancing and Law of Property Act, 1881, trustee did not include personal representative. Williams on Executors and Administrators, 13th ed., vol. 2, p. 868, para. 1374, states that before 1926, when an administrator had paid all expenses and debts and cleared an intestate's estate, he ceased to be an administrator and became a trustee for the next-of-kin: *In re Ponder.*[8] The editor of that work submits on the authority of *In re Yerburgh* [9] that, so far as pure personalty is concerned, the old law still applies. With land there is a slight difference because there an assent has to be in writing and until the administrator assents he remains an administrator. [Reference was made to *George Attenborough & Son* v. *Solomon.*[10]]

Once the estate has been cleared the personal representatives cease to act in that capacity and become trustees liable for breach of trust, but for any such breach the sureties are not liable.

Harold Christie Q.C. in reply. In *Archbishop of Canterbury* v. *Robertson* [11] it was held that the conversion by an administrator of an intestate's effects to his own use was a breach of a condition of a bond "well and truly to administer the goods of the intestate "according to law," and the surety was liable. A surety can always apply to the court for relief: *In re Anderson-Berry.*[12] Here they have not done so and, therefore, they are still liable.

[LORD GODDARD C.J. This was a very small estate and the defendants had no reason to believe that the husband would make away with the money. I cannot treat this as a case of breach of duty by the defendants as solicitors.]

Before the defendants agreed to be bound they should have satisfied themselves that the husband would not get the money in his hands.

[LORD GODDARD C.J. The whole point seems to be whether their obligation remains after the estate is cleared.]

In *In re Ponder* [13] Sargant J. was taking the matter out of the hands of the administrator by appointing trustees. *Mactaggart* v. *Watson*[14] decided that a surety continues to be liable in spite of the fact that all that is to be done has been done. If the defendants are right the beneficiary has no protection whatever, and as long as they pay the creditors they have fulfilled their duty. All the authorities cited in support of the defendants' case are cases where a trustee has been appointed. There is no case where the personal representative has discharged himself by taking the money. It is submitted that the husband was still an administrator at the time when he converted the money and that the defendants are liable as his sureties.

---

[6] [1921] 2 Ch. 59.
[7] (1889) 42 Ch.D. 302.
[8] [1921] 2 Ch. 59.
[9] [1928] W.N. 208.
[10] [1913] A.C. 76, 83.
[11] (1833) 1 Cr. & M. 690.
[12] [1928] Ch. 290.
[13] [1921] 2 Ch. 59.

Cur. adv. vult.

March 12. LORD GODDARD C.J., reading his judgment, stated the facts and continued: It is contended on behalf of the plaintiff that, as the administrator is required well and truly to administer the estate according to law, he has not done so because he has not paid over the money to her to which she was entitled. So it was contended that she is entitled to enforce the bond, and it was admitted by Mr. Pascoe Hayward for the defendants that this was a possible construction of the bond but not, he contended, the true construction. He submitted that the object of the bond was only to ensure the due winding up of the estate until the residue was ascertained and in the administrator's hands, and that, as soon as the moneys were all received and the debts paid the administration was finished and his character changed from that of an administrator to that of a trustee. That he was a trustee for his wife of course there is no doubt, and it seems to me that, unless I am compelled to do so by authority, it would be wrong to construe this bond so as to make it, in effect, one for the due performance of his duties as trustee. So to do would certainly seem to put the defendants as sureties in a most unenviable position. While they were bound to see that the administrator realized the estate and duly paid the debts, duties and costs, it does not seem to me that they were entering into this bond as sureties for the due performance of the duties of trust whereby they would become liable for the trustee's breaches of trust. Had the beneficiary been a very young child such a construction would involve their remaining liable over a long period of years without being able in any way to control the action of the trustee or relieve themselves of this onerous liability. Mr. Christie relied on *Dobbs* v. *Brain*.[1] There an administratrix having got in the estate paid the debts and legacies with one exception, a legacy of £50 bequeathed to a minor. She paid this money to her brother-in-law, who did not pay over the money and could not be found, and in an action against the sureties of the bond it was held that the payment of the £50 out of the estate having become impossible, there was a breach of the condition of the bond to well and truly administer and the sureties remained liable. But in that case it will be observed that the administratrix paid the money out of the estate to someone who had no title to it and that, in my opinion, amounts to a devastavit.

---

[14] (1835) 3 Cl. & Fin. 525.

On the other hand, it seems well established that as soon as an administrator has cleared the estate, by which I understand is meant has paid all expenses, debts and legacies, he holds the residue not as administrator but as trustee for whoever is entitled thereto: *In re Ponder*.[2] In that case Sargant J. said[3]: ". . . *Eaton* v. *Daines*,[4] a decision of Kekewich J., "shows clearly that when an estate has been wound up, and "the trust property is in the hands of an executor freed from "the administration of the estate, the office is then changed "from that of executor to that of a trustee." The actual point for decision in *In re Ponder*[5] was whether a power existed in the court to appoint a new trustee to act jointly with the administrator, but the reference to *Eaton* v. *Daines*[6] and the cases therein cited seems to make it clear that the administrator holds the residue after the debts and legacies are paid in the capacity of trustee and not of administrator. In the present case the husband was the only person entitled to receive and give a receipt for the money which the estate realized, and under the terms of the letters of administration granted to him he held the money to the use and benefit of the minor until she attained the age of 21. This view is supported, I think, by the judgment of Danckwerts J. in *In re Gibbs, decd.*,[7] where he said: "The argument against the "claim of the Inland Revenue was that there cannot be said to be "any right or claim to the residuary estate or to the enjoyment "of it until the residuary estate is ascertained by process of "administration. Until that occurs all that the persons interested "in the residuary estate have, according to law, is a right to have

---

[1] [1892] 2 Q.B. 207; 8 T.L.R. 630.
[2] [1921] 2 Ch. 59.
[3] Ibid. 62.
[4] [1894] W.N. 32.
[5] [1921] 2 Ch. 59.
[6] [1894] W.N. 32.
[7] [1951] Ch. 933, 938.

"the estate of the testator, or it may be in the case of intestacy "the estate of the intestate, duly administered. Therefore, when "finally the residuary estate is ascertained, and still more when "the executors assent to the trusts of the residuary estate and, "therefore, put off the character of executors and assume that of "trustees, with the consequences which ensue, as, for instance, "in *Attenborough* v. *Solomon*,[8] there is a change in the rights, "title and position of the persons beneficially interested in the "residuary estate." I may also refer to the decision of Romer J. in *In re Yerburgh*.[9]

Mr. Christie cited a decision of the Court of Exchequer, *Archbishop of Canterbury* v. *Robertson*,[10] but that was a case where an administrator, instead of pursuing a course of administration, simply sold securities belonging to the estate and misappropriated the proceeds. In no sense, therefore, did he administer the estate, so the obligation of the administration bond clearly attached. Here, I think, the administration ceased when the estate was realized and was clear of the debts. It does not seem to me that it makes any difference that the sum of £49 13s. 9d. was paid to the administrator by the defendants after the husband and wife had parted, nor was it suggested that the sureties knew that they had parted. Even if they did, the only person entitled to receive the money, and to whom the defendants were bound to account, was the administrator. The estate was then clear, and I think that the administration was at an end, and that the bond cannot be held to be a bond to secure the performance of his duties as trustee. For these reasons, in my opinion, there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Bailey, Breeze & Wyles; White & Leonard for Chanter, Burrington & Foster, Barnstaple.*

J. D. P.

---

[8] [1913] A.C. 76; 29 T.L.R. 79.

[9] [1928] W.N. 208.

[10] (1833) 1 Cr. & M. 690.

C. A.

1954
Mar. 3, 4,
8.

Evershed M.R.,
Denning and
Romer L.JJ.

WILSON AND ANOTHER *v.* RICKETT COCKERELL & CO. LD.

[Plaint No. J. 948.]

Sale of Goods — Breach of condition — Merchantable quality — Goods bought under trade name—"Goods supplied under a contract of "sale"—Purchase of one ton of Coalite—Damage to purchaser by explosive mixed with Coalite—Consignment not of "merchantable "quality"—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1) (2).

The defendants, coal merchants, had sold and delivered to the plaintiffs, a husband and wife, a ton of Coalite, a manufactured fuel. The wife having made up the fire with some of the Coalite, an explosion occurred in the grate caused by a piece of coal containing an explosive which had been delivered with the Coalite. The plaintiffs claimed for the damage to their room and furniture resulting from the explosion:—

Held, that the consignment of Coalite was delivered as a whole and must be considered as a whole; that the "goods supplied under "the contract of sale" for the purposes of section 14 of the Sale of Goods Act, 1893, was the whole consignment of Coalite, including the offending piece of coal; that that piece of coal made the whole consignment not fit for burning and, accordingly, it did not satisfy the implied condition imposed by section 14 (2) that the goods should be of "merchantable quality"; and that the plaintiffs were therefore entitled to judgment.

Semble, that the condition implied by section 14 (1), that goods should be reasonably fit for the purpose for which they were required, was excluded by the proviso to the subsection, on the ground that the Coalite was sold under a trade name.

Even so it must
still be of
merchantable
quality
— Bristol Tramways
v Fiat motors

Principle stated by Atkin L.J. in *Niblett Ld.* v. *Confectioners' Materials Co. Ld.* [1921] 3 K.B. 387, 404; 37 T.L.R. 653 and by Lord Wright in *Grant* v. *Australian Knitting Mills Ld.* [1936] A.C. 85, 100; 52 T.L.R. 38 applied.

Reasoning of the Inner House of the Court of Session in *Duke* v. *Jackson*, 1921 S.C. 362 disapproved.

Don't confuse
sample please'
L.J. Denning
ee Judgment: to
for don't see
appreciate the
distinctions drawn

APPEAL from a decision of Judge Granville Smith sitting at Edmonton County Court.

In these proceedings Mr. John Wilson and his wife, Mrs. Margaret Hume Wilson, claimed damages from the defendants, Rickett Cockerell & Co. Ld., coal merchants, in respect of damage to the plaintiffs' dining room caused by an explosion in their grate. The explosion was due to an explosive substance having been included in a ton of Coalite, a manufactured black smokeless fuel, in pieces of uniform size, which the defendants had, at the request of Mrs. Wilson, sold and delivered.

The facts are fully stated in the judgment of Denning L.J.

The county court judge gave judgment for the defendants, considering himself bound by the Scottish decision of *Duke* v. *Jackson* [1] to hold that there had been no breach of the condition implied by section 14 (1) of the Sale of Goods Act, 1893.[2]

The plaintiffs appealed.

D. J. C. Ackner for the plaintiffs. The county court judge held that although the Coalite had been bought under the trade name the proviso to section 14 (1) of the Sale of Goods Act, 1893, did not apply to excuse the defendants, for the plaintiffs had continued to rely on the skill and judgment of the defendants to see that the type of coal which they had ordered was fit for the purpose for which, to the defendants' knowledge, it was required, that is, to be burnt inside the house. The defendants were under a duty not only to supply "Coalite" but to see that the Coalite was fit to burn. In *Baldry* v. *Marshall* [3] the Bugatti car was bought by name, but there the customer was, in fact, asking for two things, first a "Bugatti" car, and also that the car should be suitable for touring. The second requirement involved reliance on the skill and judgment of the vendor. The county court judge found that, though there was no express condition here, one should be implied from the circumstances of the order. If Coalite is ordered by name, and a vendor knew that there is something better for the purpose for which it is required, he is under no duty to say so, but he is under a duty to tell a customer if he orders something which is not reasonably fit for the purpose, and there is a duty to see that everything supplied under the contract is reasonably fit, even if it is ordered under a trade name. In *Frost* v. *Aylesbury Dairy Co. Ld.*[4] the position would not have been different if the milk had been ordered by a trade name. The assurance of the vendor that the purchase is suitable for the purpose for which it is purchased may be derived from the conduct of the vendor. Here the defendants impliedly warranted that the Coalite was fit for the purpose of burning in the house. The evidence showed that the plaintiffs had bought Coalite for that purpose for a number of years. The onus is on the defendants to bring themselves within the proviso to section 14 (1). Unlike the rest of the subsection, the proviso applies only to goods which are the subject-matter of the contract. Only the Coalite was ordered under the trade name, and, as the county court judge has found, there was nothing wrong with the Coalite. It was the explosive material which caused the trouble.

---

[1] 1921 S.C. 362.

[2] Sale of Goods Act, 1893, s. 14: "Subject to the provisions of this Act "and of any statute in that behalf, "there is no implied warranty or con"dition as to the quality or fitness "for any particular purpose of goods "supplied under a contract of sale, "except as follows:—

"(1) Where the buyer, expressly or "by implication, makes known to the "seller the particular purpose for "which the goods are required, so as "to show that the buyer relies on "the seller's skill or judgment, and "the goods are of a description which "it is in the course of the seller's "business to supply (whether he be "the manufacturer or not), there is "an implied condition that the goods "shall be reasonably fit for such "purpose, provided that in the case of "a contract for the sale of a specified "article under its patent or other "trade name, there is no implied "condition as to its fitness for any "particular purpose:

"(2) Where goods are bought by "description from a seller who deals "in goods of that description "(whether he be the manufacturer or "not), there is an implied condition "that the goods shall be of mer"chantable quality; provided that if "the buyer has examined the goods, "there shall be no implied con"dition as regards defects which "such examination ought to have "revealed: . . ."

[3] [1925] 1 K.B. 260.

The county court judge having, rightly it is submitted, found that the proviso to section 14 (1) did not apply, went on to hold that section 14 (1) did not apply either. He followed the Scottish case of *Duke* v. *Jackson*,[5] and held that, as the explosive material was not, according to the facts as found, embedded in a piece of the Coalite, the material supplied was, lump by lump, fit for the purpose for which it was supplied, and the dangerous material was something extra supplied by the defendants which did not, as in the typhoid cases, taint the whole consignment. The reasoning in *Duke* v. *Jackson* [5] is wrong and the case ought not to be followed. The warranty as to fitness in section 14 (1) is not limited to the contract goods but applies to everything supplied "under" or in pursuance of the contract. Here the explosive material was supplied "under" the contract, for the judge found that, but for the contract, it would not have been supplied. The consignment delivered should have contained nothing but what had been ordered. The explosive material, though not ordered, was nevertheless supplied under the contract, and was, therefore, warranted as being fit to burn. *Randall* v. *Newson* [6] was not cited in *Duke* v. *Jackson*.[7] In *Geddling* v. *Marsh* [8] (also not referred to in *Duke* v. *Jackson* [9]), the mineral water bottles were not part of the subject-matter of the contract, but the supplier was held responsible for the damage caused when they burst, because they were supplied under the contract and were defective. If in the present case the sacks, for example, which had contained the Coalite had been infected, and had been left in the garage and had caused damage, the supplier would have been held responsible. *Chapronière* v. *Mason* [10] shows that the warranty was that the bun sold should be fit to eat, and it would have made no difference to the vendor's liability whether the stone was on the surface of the bun or embedded in it. *Frost* v. *Aylesbury Dairy Co. Ld.*[11] was distinguished in *Duke* v. *Jackson*,[12] but it might have been said, as is alleged here, that the subject-matter of the contract, that is, the milk in that case, was up to standard, and that the trouble was the "extra" typhoid germs which were supplied with the milk.

---

[4] [1905] 1 K.B. 608; 21 T.L.R. 300.

[5] 1921 S.C. 362.

[6] (1877) 2 Q.B.D. 102.

[7] 1921 S.C. 362.

[8] [1920] 1 K.B. 668; 36 T.L.R. 337.

[9] 1921 S.C. 362.

Even if the warranty as to fitness in section 14 (1) is confined to the actual goods which the plaintiffs agreed to purchase, it is implied that those goods are warranted to be in such a condition that they are fit for the purpose for which they are supplied. They may be unfit if they are not up to requirement: *Gillespie Bros. & Co.* v. *Cheney, Eggar & Co.*[13] and *Preist* v. *Last.*[14] In the present case, by including the explosive material in the consignment, the defendants rendered the whole consignment not up to standard, for the plaintiffs could not with reasonable diligence (and the county court judge found that they were not negligent) use the Coalite without the explosive matter, which was so much a part of the bag of Coalite that it was impossible in practice to sever it from the Coalite. Its presence altered the general characteristic of the whole consignment; just as arsenic in beer would taint the whole of the beer. Alternatively, the subject-matter may be up to standard but it may be unfit for the purpose for which it has been supplied, as in *Frost* v. *Aylesbury Dairy Co. Ld.*[15] and *Grant* v. *Australian Knitting Mills Ld.*[16] Something may have been added or be present which makes it unfit, and it is not material whether that substance can or cannot be separated from the rest of the substance supplied. Liability will not be excluded if the foreign body which renders the goods unfit for the purpose for which they are supplied is contained

---

[10] (1905) 21 T.L.R. 633.

[11] [1905] 1 K.B. 608.

[12] 1921 S.C. 362.

[13] [1896] 2 Q.B. 59; 12 T.L.R. 274.

[14] [1903] 2 K.B. 148; 19 T.L.R. 527.

[15] [1905] 1 K.B. 608.

[16] [1936] A.C. 85, 100; 52 T.L.R. 38.

C. A.
1954

Wilson
v.
Rickett
Cockerell
& Co. Ld.

in a separate container which does not contaminate the surrounding goods. It is not necessary that the foreign body should be physically inside the subject-matter of the contract. The point is, that something is added which makes the subject-matter of the contract unfit as a whole. *Chapronière* v. *Mason* [17] covers both these heads. The stone was not fit for mastication under the first head, and the bun was not fit for mastication under the second head.

Secondly, even if section 14 (1) does not apply, there is an implied warranty applicable here under section 14 (2) that the goods shall be of merchantable quality in the state in which they are sold and delivered. [Reference was made to *Grant* v. *Australian Knitting Mills Ld.*[18]] The warranty under subsection (2) is narrower than that under subsection (1). For instance, there was no breach of the warranty under subsection (2) in the Bugatti car case, *Baldry* v. *Marshall*,[19] but subsection (1) applied. [Reference was also made to *Cammell Laird & Co. Ld.* v. *Manganese Bronze and Brass Co. Ld.*[20]] But under subsection (2) there is no proviso excluding liability if goods are purchased under a trade name: *Grant* v. *Australian Knitting Mills Ld.*[18] If *Duke* v. *Jackson* [21] were rightly decided, the test would be whether a reasonable person acting reasonably and with full knowledge of the fact that an explosive substance was somewhere hidden in the Coalite would, or would not, accept the consignment as complying with his order for a ton of Coalite. See *Bristol Tramways, etc. Carriage Co. Ld.* v. *Fiat Motors Ld.*[22] In *Niblett Ld.* v. *Confectioners' Materials Co. Ld.*[23] the milk was unsaleable and unmerchantable to someone who knew the facts. "Full examination" only means with full knowledge of the facts, and with full acquaintance with all the defects. See also *Morelli* v. *Fitch & Gibbons.*[24] A full examination would have discovered the explosive material (though the judge found that the plaintiffs were not negligent in not finding it). But that is not the test: the test is whether anyone would have bought this Coalite if they had known that they would be obliged to make a detailed examination in order to find the explosive matter.

---

[17] 21 T.L.R. 633.

[18] [1936] A.C. 85.

[19] [1925] 1 K.B. 260.

[20] [1934] A.C. 402; 50 T.L.R. 350.

[21] 1921 S.C. 362.

[22] [1910] 2 K.B. 831; 26 T.L.R. 629.

[23] [1921] 3 K.B. 387; 37 T.L.R. 653.

[24] [1928] 2 K.B. 636; 44 T.L.R. 737.

C. A.
1954

WILSON
v.
RICKETT
COCKERELL
& CO. LD.

As to negligence, res ipsa loquitur. It is for the defendants to show that they took reasonable care, and there was no evidence on which the judge could find, as he did, that reasonable care was taken.

A. A. Mocatta Q.C., *E. Milner Holland Q.C.* and *A. C. Bulger* for the defendants. The county court judge found as a fact that the defendants were not negligent, and on the evidence he was entitled so to find. Section 13 of the Sale of Goods Act is not pleaded and is not open to the plaintiffs now. In any case, a claim under that section would have been unsuccessful, for the offending part of the consignment is so small in relation to the ton of Coalite that it is de minimis.

The plaintiffs have relied on section 14, but that section is concerned only with the contract goods, that is, the goods which were ordered, and does not extend to all and everything which is supplied, though not ordered. The explosive material is severable from the contract goods and that distinguishes *Chapronière* v. *Mason.*[25] " Goods " means the same thing throughout section 14. It is not permissible to construe it in a wide sense in the body of the subsection and then to limit the meaning in the proviso.

[EVERSHED M.R. If the claim is not within section 14, it seems that it must be within section 13. If the extraneous matter was so large that it could be identified, the claim would be outside section 14 and within section 13; but if it was small it would be a defect in quality within section 14.]

It is submitted that the claim is not within either sections 13 or 14. *Randall* v. *Newson*[26] was decided before the Sale of Goods Act, 1893, and is not helpful, for then " goods " was used in the relevant statutory provision in a sense which comprised what is now split up into the two sections 13 and 14. In *Geddling* v. *Marsh*[27] the contract goods had, of necessity, to be supplied in containers and, therefore, the containers were part of the contract goods. This explosive matter was not part of the contract goods, and there could not be any claim under section 14 in respect of the damage caused by it. It is just as if a piece of glass had been left in the pocket of a new car and the buyer of the car had cut his hand on it; he could not have complained that the car was not of merchantable quality. It would be different if the edge of the pocket itself were sharp, for that would be a defect in the car itself. For the damage caused by the glass the remedy of the buyer would be in negligence. In the present case the county court judge has found that the defendants were not negligent.

---

[25] 21 T.L.R. 633.

[26] (1877) 2 Q.B.D. 102.

[27] [1920] 1 K.B. 668.

The proviso to subsection (1) of section 14 applies here, because this consignment of fuel was sold under a trade name, "Coalite," with the result that subsection (1) does not apply. [Reference was made to *Baldry* v. *Marshall* [28] and *Bristol Tramways, etc., Carriage Co. Ld.* v. *Fiat Motors Ld.*[29]]

[The defendants' argument on section 14 (1) was stopped by the court.]

With regard to the second question, it is submitted that this consignment of Coalite was of merchantable quality within subsection (2) of section 14. The plaintiffs do not rely on section 13 of the Act of 1893, under which there is an implied condition that goods shall correspond with the description. If a vendor delivers a ton of the substance which has been ordered, he has satisfied the terms of his contract. The purchaser cannot complain if, in addition, something else is delivered which is wrong. *Duke* v. *Jackson* [30] bears out the distinction between section 13 and section 14 of the Act. There are two decisions of the Sheriff's Court dealing with coal: *Fitzpatrick* v. *Barr* [31] and *Lusk* v. *Barclay*.[32] In both *Duke* v. *Jackson* [33] was distinguished. The decision in *Baldry* v. *Marshall* [34] is far removed from the present case.

E. Milner Holland Q.C. following. "Goods" in section 14 must refer to the same thing throughout the section. The common denominator of "goods" is goods which it is the vendor's business to supply. Here the vendors' business was to supply Coalite and the Coalite is the goods within the section. That is the basis of the decision in *Duke* v. *Jackson*.[35] In all the cases on section 14 where the purchaser was held entitled to damages the quality of the goods supplied was affected. Here there was nothing wrong with the Coalite supplied. It was the added substance which caused the damage. Section 14 does not apply to that substance. The county court judge held that this Coalite was not itself defective.

D. J. C. Ackner in reply. Sections 13, 14 and 15 of the Act of 1893 are not mutually exclusive. There is nothing to prevent goods not answering the description and also being unfit for the purpose for which they are supplied. Section 13 is a complement to section 14. Subsection (2) of section 14 deals with defects of quality, it is not subject to the proviso in subsection (1). [Reference was made to *Arcos Ld.* v. *Ronaasen & Son*[36]; *Grant* v. *Australian Knitting Mills Ld.*[37]; *Manchester Liners Ld.* v. *Rea Ld.*[38]; *Medway Oil and Storage Co. Ld.* v. *Silicap Gel Corporation*[39]; *Cammell Laird & Co. Ld.* v. *Manganese Bronze and Brass Co. Ld.*[40]]

---

[28] [1925] 1 K.B. 260.
[29] [1910] 2 K.B. 831.
[30] 1921 S.C. 362.
[31] 1948 S.L.T.(Sh.Ct.) 5.
[32] 1953 S.L.T.(Sh.Ct.) 23.
[33] 1921 S.C. 362.
[34] [1925] 1 K.B. 260.
[35] 1921 S.C. 362.

DENNING L.J. In June, 1951, Mrs. Wilson ordered one ton of Coalite from Rickett Cockerell & Co. Ld., and it was delivered and paid for. In November, 1951, she took from the bin some of the material which they had delivered to her and which she thought was Coalite. She made up the fire with it on November 26 at about 7.30 p.m., because she and her husband wanted to listen to an item on the wireless which lasted from 7.30 p.m. until 8 p.m. Shortly before eight o'clock there was an explosion in the grate. A thick cloud of black smoke came out, the whole basket which held the Coalite was shot forward, the heavy curb was pushed forward, and most of the Coalite was scattered about the room, some of it falling on to Mrs. Wilson's dress. Bits of Coalite were found sticking to the wallpaper. The damage was considerable: it cost £117 4s. 1d. to put right. Fortunately, the plaintiffs were themselves uninjured. They now claim from Messrs. Rickett Cockerell & Co. Ld. for the damage done to the room and the furniture.

The judge has found that the explosion was due to something in the consignment which the defendants delivered. It was not a piece of Coalite itself, but something that came with it, such as a piece of coal, in which was embedded an explosive. The offending piece had not come from the manufacturers of the Coalite, but it had got mixed with it in the course of transit, such as in a coal truck or in a lorry. It was certainly in the consignment before it was delivered to the plaintiffs. The judge has found that neither of the coalmen employed by the defendants was negligent, nor were the plaintiffs negligent, in not detecting it; but, nevertheless, it did the damage, and the question is whether the plaintiffs can recover their loss from the coal merchants.

---

[36] [1933] A.C. 470; 49 T.L.R. 231.

[37] [1936] A.C. 85; 52 T.L.R. 38.

[38] [1922] 2 A.C. 74; 38 T.L.R. 526.

[39] (1928) 33 Com.Cas. 195.

[40] [1934] A.C. 402; 50 T.L.R. 350.

The judge for himself would have held that the plaintiffs could have recovered, but he felt that he ought to follow a decision of the Court of Session in Scotland, *Duke* v. *Jackson*.[1] In that case a bag of household coal purchased from a coal merchant contained a detonator which exploded while the coal was being burned in the kitchen fire. The householder lost his eye, but the Court of Session held that, on the facts alleged in the pleadings, there was no breach of the condition implied under section 14 (1) of the Sale of Goods Act, 1894. The reasoning of the Court of Session was after this wise: the coal, as coal, was all right; it was fit for its purpose; the trouble was that there was something in it which the householder did not purchase, namely, a detonator; and as he did not purchase it, he could not complain of it as a breach of contract under section 14 (1); but only for negligence, if there was any.

With all respect to the Court of Session, I must confess that I do not understand this line of reasoning. Coal is not bought by the lump. It is bought by the sack or by the hundredweight or by the ton. The consignment is delivered as a whole and must be considered as a whole; not in bits. A sack of coal, which contains hidden in it a detonator, is not fit for burning, and no sophistry should lead us to believe that it is fit.

The Court of Session were referred to the English case of the milk which contained typhoid germs, *Frost* v. *Aylesbury Dairy Co. Ld.*,[2] where this court held that the buyer was entitled to recover damages; but the Scottish court pushed that case on one side on the ground that all the milk there was contaminated, whereas none of the coal was unfit; only the detonator. Again, I am afraid I cannot follow the reasoning. I can see no distinction in principle between liquids and solids. If the admixture of an injurious ingredient makes a liquid unfit for drinking, so does the admixture of an injurious detonator make coal unfit for burning. It is no answer for the seller to say that there was nothing wrong with the coal, as coal. There was a great deal wrong with the consignment as a consignment.

It is to be noticed that the Court of Session were not referred to another case in this court, *Chapronière* v. *Mason*,[3] where a bath bun had a stone in it and the solicitor, who bought it, broke his tooth upon it. Lord Collins M.R. said that, speaking for himself, he would be inclined to say that such a bun was not reasonably fit for mastication. He was perhaps unduly hesitant when he said he was "inclined to say."

---

[1] 1921 S.C. 362.

[2] [1905] 1 K.B. 608; 21 T.L.R. 300.

[3] (1905) 21 T.L.R. 633.

In these circumstances, I think that we should not adopt the reasoning of the Court of Session, but should see how the matter stands on the sections of the Act. The principal point made before us was that section 14 does not apply to this case, because both subsections (1) and (2), it was said, only refer to the contract goods, that is, to the goods which are the subject of the contract of sale: and, so here, it refers only to the Coalite proper and not to the explosive piece which was in it.

The answer to that argument lies in the opening words of section 14, which show that the section refers to the "goods "supplied under a contract of sale." In my opinion that means the goods delivered in purported pursuance of the contract. The section applies to all goods so delivered, whether they conform to the contract or not: that is, in this case, to the whole consignment, including the offending piece, and not merely to the Coalite alone.

Nevertheless, in regard to section 14 (1), Mr. Mocatta put forward strong reasons for supposing that that subsection may be excluded in this case, because that subsection does not apply in the case of a contract for the sale of a specified article under its trade name. He said that "Coalite" was a trade name, that Mrs. Wilson simply ordered a ton of Coalite and the coal merchants purported to supply it. The parties knew, no doubt, that it was to be used as fuel for the fire, but Mrs. Wilson did not ask the sellers for any assurance as to its fitness for the purpose; she simply specified "Coalite," which was its trade name; and if she got Coalite, she could not have complained of any want of fitness. It is unnecessary to come to any decision on the merits of that argument. All I would say is that there is a good deal to be said for that point of view.

Putting subsection (1) on one side, the real question is whether subsection (2) covers this case. It provides: "Where "goods are bought by description from a seller who deals in "goods of that description (whether he be the manufacturer or "not), there is an implied condition that the goods shall be of "merchantable quality." Applying that subsection to the goods delivered in purported pursuance of the contract, it means that the consignment, which was delivered to Mrs. Wilson, ought to have been of merchantable quality. The proviso as to trade name does not apply to subsection (2). This consignment ought to have been of merchantable quality, and quite clearly it was not. The presence of the offending piece made it unfit for burning. No-one would buy the consignment if he knew that it contained somewhere in it an explosive piece. The case falls within the words of Lord Wright in *Grant* v. *Australian Knitting Mills Ld.*,[4] where he said: "it is not merchantable . . . if it "has defects unfitting it for its only proper use but not apparent "on ordinary examination:"; and also within the words of Atkin L.J. in *Niblett Ld.* v. *Confectioners' Materials Co. Ld.*,[5] when he said: "No one who knew the facts would buy them "in that state or condition; in other words, they were unsaleable "and unmerchantable."

In my opinion, therefore, this consignment was unmerchantable because of the presence in it of this explosive piece. That is sufficient to decide the case, but I would like to express my concurrence with what the Master of the Rolls observed during the course of the argument, that the more Mr. Mocatta sought to escape from section 14, the more he became impaled on section 13. Mrs. Wilson ordered Coalite from the coal merchants but they did not supply what she ordered; they delivered, not Coalite alone, but Coalite mixed with a dangerous piece of explosive.

I need not say more about that because section 13 was not pleaded, nor relied upon. Suffice it to say that section 14 (2), in my judgment, clearly covers this case. It is a subsection which was not relied on before the Court of Session in Scotland, but it covers this case. I would allow the appeal on that ground and let judgment be entered for the plaintiffs for the sum claimed.

EVERSHED M.R. I am of the same opinion. What was the contract here? According to the evidence of Mrs. Wilson, it was her practice, so far as relevant, to communicate her wants to the defendants thus: "Half" or "1 ton Coalite." That was all. In the present case, it was an order for a ton. In response to that order, the defendants delivered a load or consignment which they placed upon the garage floor. It is not in doubt, on the findings of the judge, that the explosion to which my brother has referred was attributable to a charge of high explosive somewhere and somehow secreted in a piece of fuel delivered in pursuance of the order, though not, for the reasons which the judge gave and which I am disposed to accept, in a piece of Coalite.

---

[4] [1936] A.C. 85, 100; 52 T.L.R. 38.

[5] [1921] 3 K.B. 387, 404; 37 T.L.R. 653.

The plaintiffs' claim was preferred under section 14 of the Sale of Goods Act, 1893, alternatively, under subsection (1) or (2). The answer to the claim rests upon the proposition that one can sensibly distinguish, in regard to the goods delivered in pursuance of the order, between so much as consisted of pieces of Coalite and something else; as though the contract was to deliver not a bulk consignment, not a ton of fuel called Coalite, but was a contract to deliver so many individual lumps of Coalite; with the result that, since there could be no complaint about the lumps of Coalite so ordered and delivered, the claim must be treated as referring to something else thrown in (as it were) by the defendants by way, I suppose, of a bonus or gift.

It seems to me that such an analysis is wholly divorced from the realities of the case. According to substance and reality there was here ordered, and delivered, a load of fuel. The whole of that load, to my mind, was defective because, by reason of the hidden presence of the explosive somewhere in it, all of it was potentially dangerous. The whole, in other words, was infected by the dangerous part: and it matters not that the dangerous part was not in fact a piece of Coalite but was a piece of some other fuel sent with the Coalite and in response to the order for Coalite. Having regard, therefore, to the construction that has been put upon the word "merchantable" by Lord Wright and Atkin L.J. (in the citation made by Denning L.J.) I, for my part, have no doubt whatever that the plaintiffs are able to recover under section 14 (2) of the Act.

In my judgment the case is, in principle and logic, indistinguishable from the case of the stone in the bun, *Chapronière* v. *Mason*,[6] to which Denning L.J. has referred. It is true that in that case the bun was, as a bun, defective because of the presence in it of the stone. It was, notwithstanding the stone, still a bun. But if it had been a case of a loaf of bread, it seems to me inevitable that the argument for the respondents must have led to the conclusion that the plaintiff could not have recovered because the bread as bread was without reproach, and it was only the severable, unwanted, stone which caused the damage.

Taking the view which I do under subsection (2), it is, accordingly, unnecessary for me to express any final view on the argument based upon subsection (1). I am bound, however, to say that, as at present advised and having regard to the laconic character proved in evidence of Mrs. Wilson's order, the proviso

[6] 21 T.L.R. 633.

C. A.
1954

Wilson
v.
Rickett
Cockerell
& Co. Ld.

Evershed M.R.

would appear to me, on the judge's finding that Coalite was a trade name, to be available to the defendants as an answer under that subsection; and the alternative way in which Mr. Ackner sought to escape from that difficulty under subsection (1) seems to involve the same unreal dissection of the contract which I regard as fatal to the defence under subsection (2).

I find myself, I confess, unable to accept as valid the reasoning which seems to have underlain the judgments of the Inner House of the Court of Session in *Duke* v. *Jackson*,[7] and it is because of my natural respect for that court that I have thought it desirable to add these few observations of my own to what my brother has said.

It is true that in *Duke* v. *Jackson*[7] the case turned and was debated, as I follow it, exclusively on subsection (1), because there was there no question of the use of any trade name; but, with the utmost respect to the Scottish judges, it seems to me that they fell into error in making what I have ventured to call an unreal dissection of the contract which was there before them.

It is to be noted that the case was tried and went to the Inner House, upon what is known as an adjustment of the pleadings, before any evidence had been given. It was contended for the defendants that the plaintiff, or pursuer, had failed in any event to allege the necessary facts to bring himself within the scope of section 14 (1). Thus, in the course of his judgment, Lord Dundas used this language[8]: "The case as based upon section 14 (1) of "the statute seems to me to fail utterly, because it is not said "or suggested that the coal supplied was not in fact reasonably "fit for the disclosed purpose. No complaint is made of the "quality of the coal supplied, or any part of it; the complaint "is that a foreign substance had found its way into the bag." On that ground Lord Dundas distinguished the case from such cases as the stone in the bun case.

Similarly, Lord Ormidale observed[9]: "I agree with the Lord "Ordinary that the averments of the pursuer are irrelevant to "infer a breach of warranty under the Sale of Goods Act, and "I do so on the short ground that, taking it that the coal was "supplied for the particular purpose of household consumption, "nothing that is said about it leads one to infer that it was other "than reasonably fit for that purpose. There is no complaint "about the coal as coal." I am, with the utmost respect, unable to agree with those conclusions, which seem to me to introduce altogether too great a refinement into the pursuer's pleading.

---

[7] 1921 S.C. 362.
[8] Ibid. 368.
[9] Ibid.

What was argued for the pursuer, according to the report, and what I should have thought the pursuer had pleaded, was this—and I read from the report of the argument—" Here the coal " might in itself be quite suitable for domestic use, but the " presence of the detonator among it rendered it "—that is, the whole of the coal—" dangerous to use and consequently not " reasonably fit for that purpose."

Assuming, then, that the facts proved supported the averment, it seems to me that the averment did allege the facts necessary to bring the case within the section; and I have, therefore, found myself unable to accept the answer to that argument which finds its place in the judgments of Lord Dundas and Lord Ormidale, or to feel bound accordingly to follow their decision. And it is, I think, clear that the county court judge decided the case as he did in favour of the defendants only because he felt himself bound to follow the Scottish decision.

For these reasons, in addition to those which have fallen from my brother, I think this appeal succeeds and that judgment should be entered for the plaintiffs accordingly.

ROMER L.J. I agree with the result which my brethren have indicated. It seems to me reasonably clear that the proviso to subsection (1) of section 14 prevents the plaintiffs from relying on that subsection. The judge, although he held that these goods were sold under a trade name, nevertheless found that the plaintiffs, in ordering them, relied upon the skill and judgment of the defendants. As far as I know, the only evidence which was directed to that point at all was the evidence of Mrs. Wilson, who ordered the Coalite, and all that happened was that she apparently rang up the defendants one day and told them to send a ton of Coalite. If in fact the plaintiffs did rely upon the skill and judgment of the defendants, they only did so, I think, in the sense which the judge himself had in mind, and that sense was that they were dealing with coal merchants of repute.

In the course of his judgment the judge said: " The plaintiffs " clearly ordered this Coalite from the defendants, as reputable " coal merchants and I am sure the defendants will not object if " I say that the defendants are coal merchants of very well-known " repute. There is no need to say ' Of course, you understand I " ' am relying on your judgment.' That is not how these things " are sold. The implication is that when they are buying from "those reputable coal merchants they rely upon them to send "goods to them which are suitable for their household fire."

A little later on he said: "I think they"—that is, the plaintiffs—"were quite clearly relying on the skill and judgment "of Messrs. Rickett Cockerell & Co. to send stuff for the fire, the "Coalite. They were satisfied with the Coalite as delivered by "Messrs. Rickett Cockerell; they went on relying on Messrs. "Rickett Cockerell to send them good fuel for their fire. That "is no doubt the inference which I should draw, and which I "do draw."

It seems to me that all that amounts to is that the plaintiffs were satisfied, and rightly satisfied, with the standing and reputation of the defendants, and assumed that any material with which they were supplied by the defendants and any Coalite which they received from them would be of the normal quality and in normally good condition; and, for my part, I believe that is the limit to which the plaintiffs relied upon the skill and judgment of the defendants, and that, as is shown by, amongst other things, the judgment of Atkin L.J. in *Baldry* v. *Marshall*;[10] is quite insufficient to displace the operation of the proviso to subsection (1).

On the other hand, I am well satisfied that subsection (2) of the section does apply. It seems to me that it was not permissible to sever, or to regard as severable, the explosive matter from the Coalite itself, because in fact it was not severable inasmuch as it was not distinguishable from the rest. It is quite true that the Coalite, which was Coalite, was all right and was suitable for use in a domestic fireplace, but the mass of material itself had in it an element or quality which rendered it wholly unsafe for use; and, in these circumstances, it seems to me impossible to say that the goods were of merchantable quality.

Many illustrations were suggested in argument. It occurs to me that a reasonably good one is if you take a pound of mixed chocolates and that pound includes one which is indistinguishable in outward appearance from the others but in fact contains a deadly poison. In those circumstances, it would surely be impossible to say that the pound of chocolates was merchantable because only one was poisonous.

The scope of subsection (2) is a wide one, as appears from *Niblett Ld.* v. *Confectioners' Materials Co. Ld.*,[11] where the goods in question which had been ordered were condensed milk and the goods arrived bearing a name or brand which was an infringement of the registered trade mark of certain manufacturers of condensed milk at whose instance the Commissioners of Customs impounded the goods. Then the question was litigated whether the buyers were liable to pay for them, and all the members of this court held that the defendants had broken the implied conditions of section 12 (1) of the Sale of Goods Act; but, apart from that, it was held by Bankes and Atkin L.JJ. that they had also broken the implied condition in section 14 (2) that the goods should be of merchantable quality. I think that case was an interesting one, because the inherent quality of the milk was beyond reproach. It was a collateral circumstance which rendered the goods unmerchantable.

---

[10] [1925] 1 K.B. 260.

[11] [1921] 3 K.B. 387.

Atkin L.J. treated it in this way. He said [12]: "Then were "the goods of merchantable quality? Applying the passage read "by Bankes L.J. from *Bristol Tramways, etc., Carriage Co. Ld.* "v. *Fiat Motors Ld.*[13] it seems to me that these goods were in "such a state or condition that no reasonable man would in the "circumstances accept them in performance of an offer to buy "sweetened full cream condensed milk. If he knew the real "facts he would refuse the goods on the ground that they were in "such a state or condition as to expose him to an injunction. No "one who knew the facts would buy them in that state or condi- "tion; in other words they were unsaleable and unmerchantable."

If goods which a man buys are unmerchantable because their use will lay him open to an injunction, all the more, I should say, are goods which will blow a man up if he uses them; and, accordingly, it appears to me plain that this case falls within section 14 (2) and the appeal should, therefore, in my judgment, be allowed.

Appeal allowed.

Solicitors: *Carpenters; J. G. Bosman, Robinson & Co.*

B. A. B.

---

[12] [1921] 3 K.B. 403.

[13] [1910] 2 K.B. 831, 840.

C. A.

1954
Feb. 16,
17, 26.

Lord Goddard C.J., Singleton and Hodson L.JJ.

WORMALD *v.* COLE.

[1952 W. No. 3680.]

Trespass—Cattle—Personal injury to occupier of land—Injury not due to vicious action by cattle—Damage to occupier not too remote—General damages increased.

Damages—Remoteness of damage—Trespass.

Where cattle stray from the land of their owner on to land in the occupation of another and cause personal injuries to such occupier, not as the result of any vicious action on their part, but while acting in accordance with their natural propensity, the damage sustained is not too remote and may be recovered by the occupier in an action for trespass.

Lee v. *Riley* (1865) 18 C.B.N.S. 722 and *Ellis* v. *Loftus Iron Co.* (1874) L.R. 10 C.P. 10 applied.

Per Lord Goddard C.J. I leave open the question whether it follows that if a trespassing animal attacks the occupier he can recover, though I incline to the opinion that he can.

Per Singleton L.J. The occupier is entitled to succeed on the principle stated by Atkin L.J. in *Buckle* v. *Holmes* [1926] 2 K.B. 125, 129; 42 T.L.R. 629, which summarizes the position.

Decision of Croom-Johnson J. reversed.

APPEAL from Croom-Johnson J.

The plaintiff, Mrs. Elizabeth Wormald, who at the material time was 80 years of age, lived in a cottage at Hardingham, Norfolk. Her cottage was approached from the road by a small drive, the house being on the left and the garden on the right. At the end of the drive was a garage, and at that end the plaintiff's property adjoined that of the defendant, A. P. Cole. On his land and adjoining that of the plaintiff was a shed, open on one side, but with doors on that nearest to the plaintiff's land, and it was possible for cattle to get through from the defendant's land on to the plaintiff's land in spite of some rails which he had put up on the open side of the shed. At the material time the defendant had a number of young cattle, both heifers and bullocks, on his land, all quiet, well behaved beasts which had given no trouble.

On the evening of October 8, 1951, at about 7.30 p.m., the plaintiff's man, Dunnell, who lived on her premises, saw that the defendant's animals or some of them were in the plaintiff's drive. He told the plaintiff and asked her to telephone to the defendant, which she did, but unfortunately he was out. Dunnell then went out to try to drive the beasts back so as to prevent damage being done to the garden. Most of them were then up to the garage and he fetched the plaintiff's car out and placed it across the drive so as to pen them in. Two, however, had left the others and had gone lower down the drive and nearer the house. Meanwhile, the plaintiff came out to tell Dunnell that the defendant could not be found, and as she came into the drive she saw the two young beasts and thought that she had better try to stop them from going into her garden. She raised her stick to compel the animals to stay where they were, but they, or one of them, ran in her direction and knocked her down and then turned and came back again trampling on her as she lay on the ground. There was no proof that either Dunnell or the plaintiff did anything improper which would frighten the beast, nor did it appear that it attacked the plaintiff. A witness of experience with the class of animal concerned, said that in the dark, in unusual surroundings, a heifer would be upset and would try to get back to her companions. The defendant said that in his opinion the accident was due to the clumsiness of the animal and not to panic.

Croom-Johnson J. gave judgment for the defendant. He said that he was unable to find that the heifer attacked the plaintiff; that there was no negligence on the part of anyone and that what happened was the ordinary natural thing which must sometimes happen in such circumstances. He provisionally assessed the plaintiff's general damages at £500 in addition to special damages of £700. The plaintiff appealed.

Cyril Salmon Q.C. and *I. C. Baillieu* for the plaintiff. This appeal raises a point of law in regard to cattle trespass which does not appear to be covered by any direct authority. The short submission for the plaintiff is that if A's cattle escape on to B's land and, while acting in accordance with their ordinary nature, do damage, B can recover the amount of the damage so caused including damages for any personal injury done to himself. The contention on behalf of the defendant is that it is impossible in any circumstances to recover damages for personal injuries in an action for cattle trespass. To illustrate the contention of the plaintiff: suppose that on a summer evening an occupier of land is sleeping in a chair in his garden, with a prize dog beside him, and cattle belonging to a neighbouring farmer come into the garden and, acting in accordance with their ordinary nature, tread upon and damage the lawn and flowers and also tread upon and injure the occupier and his dog. It is submitted that in such circumstances the occupier is entitled to recover damages not only for the damage to the lawn, the flowers and the dog, but also for the personal injuries which he himself sustained. It is conceded that the case might be different if the animals made a savage attack on the occupier which was contrary to their natural propensity, since then the damage might be too remote. It may be that in such a case the occupier could not recover without proof of scienter. There is a great deal of authority which tends to support the view for which the plaintiff contends, but it is believed that there is none in favour of the defendant's contention that in no circumstances can damages for personal injuries be recovered in an action for cattle trespass.

[LORD GODDARD C.J. I believe that it is the oldest form of action known to the law?]

That is so, and in early days the damages recoverable under it were confined to damage done to the soil and the crops growing thereon. That view was gradually extended, and *Lee* v. *Riley*,[1] where damages were recovered where a trespassing horse had kicked another with the result that it had to be destroyed, is an authority supporting the contention that the damage in the present case was not too remote to be recoverable in an action for cattle trespass, and shows that the damage recoverable in such an action was not confined to that done by a trespassing animal to the soil and growing crops, but might include damage done to another animal. That case was followed in *Ellis* v. *Loftus Iron Co.*,[2] where again, on somewhat similar facts, the damage was held not to be too remote. The basis of the decision in both those cases was that what happened was the kind of thing which might occur if a horse escaped and proceeded to act in accordance with its ordinary nature. Both cases were considered in *Manton* v. *Brocklebank*,[3] where Lord Sterndale M.R. said [4] that what was decided both in *Lee* v. *Riley* [5] and *Ellis* v. *Loftus Iron Co.*[6] was that if the defendant's horse was trespassing, and so giving a cause of action to the plaintiff, the act of the horse in kicking another was not so alien to horse-nature as to make the resulting damage too remote to be recovered: see also *per* Warrington L.J.[7] and Atkin L.J.[8] In the present case it is submitted that the act of the heifers was not so contrary to their nature as to make the damage done to the plaintiff too remote.

---

[1] (1865) 18 C.B.N.S. 722.

[2] (1874) L.R. 10 C.P. 10.

[3] [1923] 2 K.B. 212; 39 T.L.R. 344.

[4] [1923] 2 K.B. 212, 221.

[5] 18 C.B.N.S. 722.

[6] L.R. 10 C.P. 10.

[7] [1923] 2 K.B. 212, 225.

[8] Ibid. 230.

In *Buckle* v. *Holmes*[9] Atkin L.J. said that, where an animal for whose trespasses its owner was liable did damage as the result of following a normal propensity on its part, the owner would be liable, but not for damage resulting from an abnormal propensity not known to him, though he would, of course, be liable for the ordinary consequences of the trespass. That passage puts the whole of the plaintiff's case and, if Atkin L.J.'s statement of the law is correct, it is submitted that the plaintiff must succeed. It is true that the present is the first case in which a plaintiff has sought to recover damages for personal injuries in an action for cattle trespass, but *Lee* v. *Riley*[10] was the first case in which a plaintiff had sought to recover damages in such an action for injury to his chattel. There is no distinction in principle between injury to the plaintiff's horse and injury to his person, and it is submitted that it would be absurd to exclude damages for personal injuries from the ambit of damage recoverable in an action for cattle trespass. [On the question of liability, reference was also made to *Bradley* v. *Wallaces Ld.*,[11] *Thurogood* v. *Van Den Bergs & Co. Ld. and Jurgens Ld.*[12] and *Deen* v. *Davies*.[13]] With regard to the general damages provisionally assessed by Croom-Johnson J., the sum of £500 was quite inadequate having regard to the serious nature of the plaintiff's injuries.

Marven Everett Q.C. and *John Russell* for the defendant. Croom-Johnson J. rightly held that the defendant was not liable for the damages claimed. No question of negligence on the part of the defendant now arises since it is not suggested for the plaintiff that the judge's finding that there was none could be impugned. With regard to the plaintiff's claim in trespass, it has been said, and while the statement may not be of direct authority, it is of the highest persuasive authority, that in a case of cattle trespass no action will lie for personal injuries. (See "Report of the Committee on the Law of Civil Liability for "Damage done by Animals" (Cmd. 8746), p. 4, para. 3.) It is there stated that cattle trespass is "one of the oldest forms of "action known to the common law. It is based on the duty of "the owner to keep his cattle on his own land and to prevent "them from straying. The result of the modern cases on this "subject is that a person can recover for damage done to his

---

[9] [1926] 2 K.B. 125, 129; 42 T.L.R. 629.

[10] 18 C.B.N.S. 722.

[11] [1913] 3 K.B. 629; 29 T.L.R. 629.

[12] [1951] 2 K.B. 537; [1951] 1 T.L.R. 557; [1951] 1 All E.R. 682.

[13] [1935] 2 K.B. 282; 51 T.L.R. 398.

"land and crops by trespassing cattle irrespective of negligence "on the part of their owner, but in the absence of scienter cannot "recover for damage to the person whether caused to himself or "his servants. This must be taken to be established by *Ellis* v. "*Loftus Iron Co.*[14] and *Bradley* v. *Wallaces Ld.*[15]"

In *Cox* v. *Burbidge*[16] Willes J. said: "As to animals which "are not naturally of a mischievous disposition, the owner is not "responsible for injuries of a personal nature done by them, "unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have "been aware of the fact." That is the doctrine of scienter, which is as old as the book of Exodus: see Chap. 21, verses 28, 29

[LORD GODDARD C.J. What we have to consider is whether the damage which was done was too remote in an action of trespass.]

[SINGLETON L.J. What is the test?]

The test is this: the law having always recognized that it is not within the natural propensity of a domestic animal to cause injuries to mankind, it follows that in the absence of scienter there must be some abnormal behaviour by the animal. In *Searle* v. *Wallbank*[17] Lord du Parcq put the whole of the argument for the defendant in this case in a nutshell. He said that "it is "a commonplace of our law that there is a striking contrast "between the liability of an owner of cattle for their trespass on "another's land and his liability for any injuries which they may "cause to the person of another. The man whose cattle stray "into his neighbour's field and consume or damage what belongs "to that neighbour, is liable to make good the loss although no "negligence is proved against him. He is under no such liability "for a trespass to the person by an animal which does not belong "to an untamed and dangerous species unless it has, to his "knowledge, some vicious or mischievous propensity." (See also Professor Glanville Williams's Liability for Animals, pp. 156–9.)

With regard to the observations of Atkin L.J. in *Buckle* v. *Holmes*,[18] on which the plaintiff strongly relies, they must be read in connexion with what he said in *Manton* v. *Brocklebank*,[19] where he quoted with express approval the words of Williams and Willes JJ. in *Cox* v. *Burbidge*[20] with reference to the acquisition by the animal of some vicious or mischievous propensity where the owner is shown to be aware of the fact. In *Fletcher* v. *Rylands* [21] Blackburn J., dealing with the obligation of an owner of cattle, said: "The law as to them seems to be perfectly settled "from early times; the owner must keep them in at his peril or "he will be answerable for the natural consequences of their "escape; that is with regard to tame beasts for the grass they "eat and trample upon, though not for any injury to the person "of others, for our ancestors have settled that it is not the general "nature of horses to kick or of bulls to gore; but if the owner "knows that the beast has a vicious propensity to attack man "he will be answerable for that too."

---

[14] L.R. 10 C.P. 10.

[15] [1913] 3 K.B. 629.

[16] (1863) 13 C.B.N.S. 430, 439.

[17] [1947] A.C. 341; 63 T.L.R. 24; [1947] 1 All E.R. 12.

[18] [1926] 2 K.B. 125; 42 T.L.R. 629.

[19] [1923] 2 K.B. 212; 39 T.L.R. 344.

[20] 13 C.B.N.S. 430.

Blundering about in the dark and knocking down a human being, which is what was alleged in the present case, is not a natural propensity in a heifer. Even if it were a natural propensity, the action of the plaintiff in trying to stop the heifers constituted a novus actus on her part. In conclusion it is submitted (1) that the plaintiff never had a cause of action, and (2) that if she had, no damage was recoverable, because it was too remote.

[*Heath's Garage* v. *Hodges* [22]; *Smith* v. *Cook* [23]; *Read* v. *Lyons*,[24] and *The Oropesa* [25] were also referred to.]

Cyril Salmon Q.C. replied.

Cur. adv. vult.

Feb. 26. The following judgments were read.

LORD GODDARD C.J. This appeal raises yet another and, so it is said, a novel question in the law relating to personal injury caused by animals to human beings. The plaintiff, a woman over 80 years of age, was knocked down and trampled on by a heifer belonging to the defendant which was trespassing in her garden, and thereby sustained most grievous injuries; and, as it is suggested that the case presents features which distinguish it from the many previous decisions on the subject, it is necessary to state the facts carefully. The action was tried at the Norfolk Assizes by Croom-Johnson J. in June, 1953, and the judge did not deliver judgment till October 14. It is, I think, clear from what he said that he depended on the shorthand-note for his statement of the

---

[21] (1866) L.R. 1 Ex. 265, 280.

[22] [1916] 2 K.B. 370; 32 T.L.R. 570.

[23] (1875) 1 Q.B.D. 79.

[24] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471.

[25] [1943] P. 32; 69 T.L.R. 103; [1943] 1 All E.R. 471.

C. A.
1954

WORMALD
v.
COLE.

Lord Goddard
C.J.

facts rather than on his recollection of the evidence at the hearing. Accordingly, as we have the same note, this court is in as good a position as the judge for forming an opinion as to the facts and, moreover, the incidents which led to the accident are not really in dispute. [His Lordship stated the facts substantially as set out above and continued:] The case presented for the plaintiff is based solely on cattle trespass and damage naturally resulting therefrom. On the other hand, it is said that for this cause of action no damage can be recovered in law except that for the actual damage done to the soil and for the depasturing of crops growing thereon which may be eaten or trodden by the trespassing animal.

In his careful argument Mr. Salmon admitted (though it must not be assumed that I necessarily agree) that had the injuries been caused by an attack or by a vicious propensity in the animal he could not, in the absence of scienter, have succeeded; but he contended that if the damage was due to natural propensity the plaintiff could recover. It was on this ground that he distinguished this case from the many previous decisions; and it is, I think, true to say that hitherto there does not seem to have been any reported case where the injury to a human being has been caused otherwise than by a so-called vicious action of an animal. Is it, then, the law that in no case can injury caused to mankind by an animal be actionable in the absence of scienter? In my opinion, the all-important consideration is that the plaintiff was the occupier of land on which a trespass was committed, so that the only question is whether the damage is too remote.

Cattle trespass is one of the most ancient causes of action known to the common law. From the writs collected and set out in Professor Glanville Williams's work on the Law of Animals (Cambridge University Press 1939) it is evident that it was well established in the fourteenth century.

The action lies apart altogether from negligence, and as Brett J. put it in *Ellis* v. *Loftus Iron Co.*,[1] the mere act of an animal belonging to man may be a trespass inasmuch as the same act, if done by himself, would have been a trespass. For this he cited Blackstone's Commentaries, 16th ed., vol. 3, chap. 12, p. 211, where it is stated that a man is answerable not only for his own trespass but for that of his cattle also, and "if any unwarrantable "act of the defendant or his beasts in coming upon the land be "proved, it is an act of trespass for which the plaintiff must

---

[1] (1874) L.R. 10 C.P. 10.

"recover some damages; such however as the jury shall think "proper to assess." The passage in Comyns Digest to which Brett J. also referred is to the same effect, but does not add anything to this statement of the law. In *Scott* v. *Shepherd*,[2] the leading case as to the difference between trespass and case, it was laid down that if the act be in the first instance unlawful, trespass will lie for the consequences of it. So it appears, as I said above, that the real question is whether the personal injuries in this case are the consequence of the unlawful entry of the cattle on the plaintiff's land. Speaking for myself, if it were not for the many previous decisions, I do not think that I should feel any difficulty in saying that they were, but as Blackburn J. said in *Smith* v. *Cook*,[3] the law has been settled by authority rather than by reason, so an examination of the cases is necessary.

There seems no doubt that originally the damage in an action of cattle trespass was confined to damage to the surface trespassed upon and to the depasturing of the crop. This appears from the writs collected in Professor Glanville Williams's book, to which I have already referred. The first extension of this rule seems to have been in *Anderson* v. *Buckton*,[4] where the plaintiff recovered because his cattle were infected with disease by the trespassing beasts. So some advance on the ancient rule was then established. The next step was in the oft-cited case of *Lee* v. *Riley*,[5] decided 147 years later. A mare strayed on to the plaintiff's land through a defective hedge and kicked the plaintiff's horse with the result that it had to be destroyed. There was no evidence that the mare was vicious, and so reliance was placed on *Cox* v. *Burbidge*,[6] to which I shall refer in a moment. The case was an appeal from the county court, so there were no formal pleadings; Erle C.J. and Keating J. treated it purely as one of cattle trespass; Byles J. and Montague Smith J. considered it from the point of view of negligence. (In parentheses I may mention that, at any rate where the escape is due to a defect in a fence which the defendant is bound to repair, the action lay either in trespass or case—see *Star* v. *Rookesby*.[7]) All four judges held that the damage caused by the death of the horse was not too remote. Erle C.J. said that it was unnecessary to consider scienter as the injury

---

[2] (1773) 2 W.Bl. 892; 1 Sm.L.C., 13th ed., 513.

[3] (1875) 1 Q.B.D. 79.

[4] (1719) 1 Str. 192.

[5] (1865) 18 C.B.N.S. 722.

[6] (1863) 13 C.B.N.S. 430.

[7] (1711) 1 Salk. 335.

C. A.
1954

WORMALD
v.
COLE.

Lord Goddard
C.J.

was not one which was characteristic of vice or ferocity in the ordinary sense. The animal had strayed from its own pasture, and it was impossible that her owner could know how she would act when coming suddenly in the night-time among strange horses. He refused to regard the case as governed by *Cox* v. *Burbidge*,[8] and concluded by saying that there was abundant evidence that the mare trespassed on the plaintiff's close and there did the injury of which the plaintiff complained. Montague Smith J., though he regarded the cause of action as negligence, considered that the damage was not too remote and said that the accident might have happened without any vice and was probably occasioned by the sudden meeting together of strange horses in the night-time.

Before passing to *Ellis* v. *Loftus Iron Co.*,[9] it is necessary to say a word about *Cox* v. *Burbidge*,[10] always regarded as a leading case in the law relating to animals. In that case the horse strayed on to the highway and there injured the plaintiff. As there was no proof of scienter, it was held that there was no liability. The vital distinction between that case and *Lee* v. *Riley* [11] is that in the former the plaintiff could not maintain an action for cattle trespass as he did not own the soil in the highway, nor would the action lie in negligence because the law is, unfortunately as some may think, that the owner of an animal does not owe a duty to persons using a highway to prevent his animals straying thereon. The plaintiff could, therefore, only recover on proof of scienter in an action for negligence, and of scienter there was no proof.

Coming now to *Ellis* v. *Loftus*,[12] *Lee* v. *Riley* [13] was followed. Here, again, it was one animal injuring another, and the court, holding that there was a technical trespass by the defendant's horse, decided that the damage was not too remote. It is, I think, often assumed that both in this case and in *Lee* v. *Riley* [13] the basis of the decision was that it was natural in horses to attack one another, but I cannot find that any of the judgments so state. In *Lee* v. *Riley* [13] Erle C.J. said no more than that the two horses had a contest, and Byles J. said that it appeared that the defendant's horse kicked the plaintiff's in sport or quarrel. In *Ellis* v. *Loftus* [14] nothing was said on the subject. In both cases it appears to me that the ratio decidendi was the same; that is to say, a trespassing horse damaged another, the property of the occupier of the close; the reason for the one injuring the other was not explained; it might have been pure accident, but it followed that the damage resulted from the trespass. *Lee* v. *Riley*[15] was considered as conclusive of *Ellis* v. *Loftus*,[14] and so far as I am aware, the decision has never been questioned. Of course, as in all actions of trespass, it is only the occupier who can recover in respect of the wrong. But what distinction, so far as remoteness of damage is concerned, can be drawn between an injury inflicted by a trespassing animal on the occupier himself and one inflicted on his horse or other chattel? Let us see, then, if subsequent cases have drawn such a distinction. I may refer to *Theyer* v. *Purnell*,[16] because while that was a case again of injury to sheep which were infected by trespassing animals and not of personal injury to the owner, the Divisional Court, Lord Trevethin C.J. and Avory J., reviewed many of the cases and held that where the action was founded on trespass the doctrine of scienter had no application.

---

[8] 13 C.B.N.S. 430.
[9] L.R. 10 C.P. 10.
[10] 13 C.B.N.S. 430.
[11] 18 C.B.N.S. 722.
[12] L.R. 10 C.P. 10.
[13] 18 C.B.N.S. 722.
[14] L.R. 10 C.P. 10.

Turning now to *Bradley* v. *Wallaces Ld.*,[17] a workman was killed by the kick of a horse brought on to his employers' premises by a third party from whom the employers claimed indemnity for the compensation which they had had to pay to the dependants of the workman. There was no proof of scienter. Assuming that the bringing of the horse to the yard was a trespass, Kennedy L.J. pointed out that if it did damage to the occupiers of the yard the owners of the horse would have to pay for it, but the injured man could not have sued for trespass. So far as negligence was concerned, there being no proof of scienter, the injured man could not have recovered. This seems a direct authority that, apart from scienter, the occupier, though not a third party, can recover in trespass for any damage suffered by him. *Manton* v. *Brocklebank*[18] was the case principally relied on by the defendant. But the all-important distinction between that case and the present is that in the former there was no trespass. No doubt was thrown by the Master of the Rolls on either *Lee* v. *Riley*[19] or *Ellis* v. *Loftus Iron Co.*[20] True, he said that those cases decided that if the plaintiff had an action in trespass the act of the horse in kicking another was not so alien to horse nature as to make the resulting damage too remote,

? Trespass to person and [illegible]
If the horse had injured the man, this is [illegible] this is a trespass to the person.
The kicking by the horse is [illegible] in [illegible]

---

[15] 18 C.B.N.S. 722.
[16] [1918] 2 K.B. 333.
[17] [1913] 3 K.B. 629; 29 T.L.R. 705.
[18] [1923] 2 K.B. 212; 39 T.L.R. 344.
[19] 18 C.B.N.S. 722.
[20] L.R. 10 C.P. 10.

C. A.
1954

WORMALD
v.
COLE.

Lord Goddard C.J.

and I have already said that those judgments do not appear to me to proceed on what is, or is not, the natural disposition of horses, but merely on the fact that the trespassing horse did damage. The judgment of Atkin L.J. seems throughout to emphasize the difference that results where the action is founded in trespass from one where negligence which involves scienter is the cause of action; and this is emphasized by him in *Buckle* v. *Holmes*.[21] The main point for decision there was whether for the purpose of trespass a cat is in the same category as a dog. At common law the owner of a dog is not liable for its trespass, and the owner is therefore only liable for damage that it may do if scienter is proved. Mere trespass is not enough, and this court held that the owner of a cat had the same immunity from liability for trespass as a dog owner. Atkin L.J. said [22]: "I think the conclusion in this case follows from *Manton* "v. *Brocklebank*,[23] which makes it clear that one who keeps a "domestic animal is not rendered liable by the mere fact that "the animal does damage in following a natural propensity of its "kind to do damage in certain circumstances; unless the animal "is one for whose trespasses the owner is liable." I cannot regard any of this passage as an obiter dictum. As a cat is not one of those animals for whose trespasses the owner is liable, there was no liability. Unless he is liable in trespass, the owner will not be liable from the mere fact that the animal does damage, but scienter must be proved.

So far, none of these cases appear to me to qualify in any respect what I believe to be the true result of *Lee* v. *Riley* [24] and *Ellis* v. *Loftus Iron Co.*,[25] but the defendant naturally relied on a passage in the speech of Lord du Parcq in *Searle* v. *Wallbank*.[26] It is true that he said "there is a striking contrast "between the liability of the owner of cattle for their trespass "on another's land and his liability for any injuries which they "may cause to the person of another," and then quotes *Mason* v. *Keeling*.[27] But I feel quite confident that the noble and learned Lord had not in mind facts such as the present. The House was concerned only with the question whether the owner of land abutting on the highway is under a duty to users of the highway to prevent his animals straying thereon unless he knows them to be dangerous, and the dictum which he cited from *Mason* v. *Keeling*[27] dealt only with that matter. Cattle trespass was not before the House. It no doubt may be said to be anomalous that a man can maintain an action of trespass to land without proof of scienter, though for injury to the person apart from trespass to land he must proceed in negligence and prove scienter. But this does not, in my opinion, affect the question whether personal injury to the occupier caused during, and as a consequence of, trespass to land may not be the subject of recoverable damage.

---

[21] [1926] 2 K.B. 125; 42 T.L.R. 369.

[22] [1926] 2 K.B. 125, 129.

[23] [1923] 2 K.B. 212.

[24] 18 C.B.N.S. 722.

[25] L.R. 10 C.P. 10.

[26] [1947] A.C. 341, 358; 63 T.L.R. 24; [1947] 1 All E.R. 12.

[27] (1699) 1 Ld.Raym. 606.

Having, I hope, dealt with at least part of the relevant authorities, I can find nothing which compels me to hold that if the occupier of a close is injured by a trespassing animal the damage is too remote, at any rate where the injury is not the result of a vicious attack. How can this case be distinguished from *Lee* v. *Riley*?[28] The action of the heifer was not due to, or characteristic of, vice or ferocity, and the words of Erle C.J.,[29] "The animal had strayed from its own pasture; and it was "impossible that her owner could know how she would act when "coming suddenly in the night-time into a field among strange "horses," seem exactly to fit the case if one substitutes strange humans for strange horses. If the heifer had injured a pony or calf belonging to the plaintiff by the same act whereby the plaintiff was injured, clearly the defendant would have been liable. If that damage is not too remote, how can it be if inflicted on the plaintiff herself instead of on her animal? Moreover, I would refer again to the words of Brett J. in *Ellis* v. *Loftus Iron Co.*[30] cited earlier in this judgment. Suppose, then, a trespasser on a dark or foggy night ran into the occupier in his drive and thereby caused him to fall and injure himself, or a trespasser in a building ran out as the occupier appeared and collided with him and, without intending to do so, caused him personal injury, it seems to me clear that the trespasser would be liable for the injury as part of the damage for the trespass. I leave open the question whether it follows that if a trespassing animal attacks the occupier he can recover, though I incline to the opinion that he can; I do not think that that question has ever yet arisen in a cattle-trespass case, and it does not arise here. In many cases it would be impossible to say with certainty whether the injuries were caused by vice or playfulness, or mere accident.

---

[27] (1699) 1 Ld.Raym. 606.

[28] 18 C.B.N.S. 722.

[29] Ibid. 734.

[30] L.R. 10 C.P. 10.

C. A.
1954

WORMALD
v.
COLE.

Lord Goddard C.J.

I would, however, mention one other matter as it was raised during the argument. The reason why the owner of land or premises adjoining the highway has no remedy if cattle being driven along the highway stray into them, unless negligence in the drover is proved, depends on the doctrine of volenti. By occupying premises on the highway he takes the risk. (See *per* Atkin L.J. in *Manton* v. *Brocklebank*,[31] and *Tillett* v. *Ward*.[32])

I would allow the appeal, and, accordingly, it is necessary to consider the question of damages. The provisional assessment by the judge of £500 in addition to special damage is, I confess, so small and inadequate that I can only think that after the time which elapsed between hearing and judgment he must have forgotten the really grievous injuries which the plaintiff sustained and may have mislaid the medical reports. It is truly amazing, as her doctor said, that she survived. I need not recapitulate her injuries or the crippled condition in which she is left. Her suffering must have been indeed severe, and pain continues. Moreover, she has to have the services of a nurse-companion, which is a considerable expense to her, and will continue. I think that the judge must have put the damages so low on account of her age, but it is now over two and-a-half years since the accident and she is still alive. To the special damage of £700 I would add £1,500, and she must have the costs here and below.

SINGLETON L.J. At night-time on October 8, 1951, the defendant's cattle escaped from his land and trespassed on the plaintiff's premises. She and her man went out to prevent damage being done so far as it was possible. One or more of the beasts came into collision with the plaintiff, knocked her down and trampled on her so that she was seriously hurt. She brought an action against the defendant claiming damages. Her case was heard by Croom-Johnson J. at the Norwich Assizes on June 12, 1953. At a later date he heard argument in London, and on October 14, 1953, he gave judgment in favour of the defendant. The plaintiff appeals to this court. Her claim is based on cattle trespass; there was an alternative claim for damages for negligence, but that was not seriously argued in view of the findings of fact of Croom-Johnson J.

In *Read* v. *J. Lyons & Co. Ld.*[33] Viscount Simon said: "The "pasturing of cattle must be one of the most ordinary uses of

---

[31] [1923] 2 K.B. 212, 231.

[32] (1882) 10 Q.B.D. 17.

[33] [1947] A.C. 156, 166; 62 T.L.R. 646; [1946] 2 All E.R. 471.

" land, and strict liability for damage done by cattle enclosed on " one man's land if they escape thence into the land of another, " is one of the most ancient propositions of our law. It is in fact " a case of pure trespass to property, and thus constitutes a wrong " without any question of negligence."

The right to recover damages in such a case is in the occupier by virtue of his occupation (though there may be a right in the owner of the land in certain circumstances). The liability is limited to the reasonable and natural consequences of the cattle escaping. It is in the nature of cattle to eat that which appeals to them, to whomsoever it belongs. And it is natural that if they trespass on the land of another they will knock down, or trample upon, and so damage some of the growing crops or vegetables thereon. It follows that in the normal case of cattle trespass the damages which are recovered are those arising from injury to crop and shrubs, or to the soil. There is no reported case in which a plaintiff suing for damages for cattle trespass has recovered damages in respect of personal injuries. It may be said that there is some authority to the contrary in the statement of Lord du Parcq in *Searle* v. *Wallbank*[34]: " My Lords, it is a " commonplace of our law that there is a striking contrast between " the liability of the owner of cattle for their trespass on another's " land and his liability for any injuries which they may cause to " the person of another. The man whose cattle stray into his " neighbour's field, and consume or damage what belongs to that " neighbour, is liable to make good the loss although no negligence " be proved against him. He is under no such liability for a " trespass to the person by an animal which does not belong to " an untamed and dangerous species unless it has, to his knowledge, some vicious or mischievous propensity. We are here " dealing with ancient doctrines of the common law." The case which was then under appeal was one in which a cyclist had been injured through colliding with a horse on the highway, and thus the words of Lord du Parcq which I have quoted were not strictly relevant to the question before the House.

The submission on behalf of the defendant, the respondent to this appeal, was based to some extent on the decision in *Cox* v. *Burbidge*.[35] That, again, was a case arising upon a highway. The defendant's horse kicked a child who was playing on the road. It was held that the defendant was not liable. In the course of his judgment Erle C.J. said[36]: " To entitle the plaintiff to recover,

---

[34] [1947] A.C. 341, 358.
[35] 13 C.B.N.S. 430.
[36] Ibid. 436.

C. A.
1954

WORMALD
v.
COLE.

Singleton L.J.

"there must be some affirmative proof of negligence in the "defendant in respect of a duty owing to the plaintiff. But, even "if there was any negligence on the part of the owner of the horse, "I do not see how that is at all connected with the damage of "which the plaintiff complains. It appears that the horse was on "the highway, and that, without anything to account for it, he "struck out and injured the plaintiff. I take the well-known "distinction to apply here, that the owner of an animal is answer-"able for any damage done by it, provided it be of such a nature "as is likely to arise from such an animal, and the owner knows "it. . . . The owner of a horse must be taken to know that the "animal will stray if not properly secured, and may find its way "into his neighbour's corn or pasture. For a trespass of that "kind, the owner is of course responsible." And Williams J. said[37]: "If I am the owner of an animal in which by law the "right of property can exist, I am bound to take care that it does "not stray into the land of my neighbour; and I am liable for any "trespass it may commit, and for the ordinary consequences of "that trespass."

Mr. Marven Everett further submitted that the injury done to the plaintiff was not the natural or ordinary result of the trespass, and that, in any event, the damage was too remote.

The claim of the plaintiff can be put simply. It is: "I was "injured through the defendant's cattle trespassing on my land; "the damage which I suffered was the natural result of the tres-"pass, and I am entitled to recover in respect of it." It is necessary to look into the decided cases in order to see whether there is support for this claim.

In *Lee* v. *Riley*,[38] the facts were that through the defendant's neglect to repair his fence his mare strayed in the night-time into an adjoining field and so into a field of the plaintiff's in which there was a horse. The defendant's mare kicked the plaintiff's horse, as a result of which the horse had to be destroyed. It was held that the defendant was responsible for the mare's trespass, and that the damage was not too remote. Erle C.J. was of opinion that the case was to be governed by a totally different principle from that stated in *Cox* v. *Burbidge*.[39] He said[40]: "It "is plain that the defendant's mare was trespassing on the "plaintiff's close; and I think it is equally clear upon the evidence "that the defendant's mare did inflict upon the plaintiff's horse "the injury which was the cause of its death: the question is,

---

[37] 13 C.B.N.S. 438.

[38] 18 C.B.N.S. 722.

[39] 13 C.B.N.S. 430.

[40] 18 C.B.N.S. 722, 734

"whether or not the damage was too remote." Byles J. and Montague Smith J. based their judgments on negligence. Keating J. said [41]: "I also think the plaintiff is responsible for the "consequences of the trespass committed by his mare, and that "the damage was not too remote. I see nothing that can fairly "be found fault with in the summing-up of the learned judge." Thus, as early as the year 1865, damages were awarded in respect of trespass of this kind for something other than damage to crops or to the land.

The decision in *Ellis* v. *Loftus Iron Co.*[42] was to the like effect. Lord Coleridge C.J. said [43]: "That may be a very small trespass, "but it is a trespass in law. The only remaining question is, "whether the damages were too remote? I cannot see that they "were: they were the natural and direct consequence of the "trespass committed." Keating, Brett and Denman JJ. all agreed that action lay on ground of trespass.

In *Bradley* v. *Wallaces Ld.*[44] the claim of the third party to an indemnity failed on the ground that the case was covered by the decision in *Cox* v. *Burbidge*,[45] but it is right that I should refer to two of the judgments. Sir H. Cozens-Hardy M.R. said [46]: "So far as trespass is concerned, if a horse, pursuant to its "natural instincts, eats a neighbour's hay, or in any other respects "indulges its ordinary natural instincts, the owner may be liable, "but otherwise not. The damage in the present case does not "naturally flow from the trespass and is not an ordinary con-"sequence of the trespass. It is too remote." Kennedy L.J., assuming trespass, said [47]: "What is the legal result? That, if "the horse did damage to the respondents, the owners of the "land, the appellants would have to pay for it; not that injury "done by the horse, not known by his owners to be vicious, "kicking a third party on the premises, is, because the horse is "a trespassing horse, an actionable wrong for which that third "party can sue."

Buckle v. *Holmes* [48]—the cat and the pigeons case—is helpful by reason of a passage in the judgment of Atkin L.J.,[49] where he said: "I think the conclusion in this case follows from *Manton* "v. *Brocklebank*,[50] which makes it clear that one who keeps a "domestic animal is not rendered liable by the mere fact that the

---

[41] 18 C.B.N.S. 735.

[42] L.R. 10 C.P. 10.

[43] Ibid. 12.

[44] [1913] 3 K.B. 629.

[45] 13 C.B.N.S. 430.

[46] [1913] 3 K.B. 633.

[47] Ibid. 637.

[48] [1926] 2 K.B. 125.

[49] Ibid. 129.

[50] [1923] 2 K.B. 212.

"animal does damage in following a natural propensity of its kind "to do damage in certain circumstances; unless the animal is one "for whose trespasses the owner is liable. When the owner is "liable for the animal's trespasses it may be material to consider "whether the damage it does is the result of a normal propensity. "For this damage the owner is liable; but for damage resulting "from an abnormal propensity not known to him he is not in "my opinion liable, though he would of course be liable for the "ordinary consequences of the trespass."

The result of the authorities to which I have referred seems to me to be that in a case of cattle trespass the damage is not confined to damage to the land. The occupier has a right of action and may recover damages which are the reasonable and natural consequences of the trespass.

The plaintiff had gone out of her house to prevent damage if possible. She did nothing improper or negligent, nor did her man. He said that the cattle all seemed to be quiet. A witness, who was called on behalf of the plaintiff and who had some knowledge of cattle, said: "It was dark; the surroundings of a garden would "be unusual to the animal and I think all the animals would be "upset, and the one which had got away from the others would "be particularly upset." There was no reason to attribute any vicious or unusual propensity to any of the cattle; they were later found in another field grazing peaceably. The defendant said of the incident or incidents: "I would say it was clumsiness, not "panic." Croom-Johnson J. said that he was unable to find that in any sense the heifer attacked the plaintiff; it came up against her and knocked her down. He added: "I find there was no "negligence on anybody, but what happened was the ordinary "natural thing which must sometimes happen in such circum-"stances." This finding gives considerable support to the case for the plaintiff.

If a number of cattle trespass on land and do damage, the owner of the cattle is responsible for the damage reasonably and naturally resulting therefrom. If they eat crops or vegetables damages are recoverable therefor, and the same applies in respect of vegetables trampled on or knocked down. What is the difference in principle between the knocking down of vegetables or plants and the knocking down of the occupier who owns the vegetables? The occupier has a cause of action in respect of the damage naturally flowing from the trespass, and if he, or she, happens to be in the garden at night-time when the trespass takes place and is knocked down and injured, I see no reason

C. A.
1954

WORMALD
v.
COLE.

Singleton L.J.

for saying that the damage is not the natural result of the trespass. I cannot see that it is too remote, and in this regard I repeat Croom-Johnson J.'s words: "What happened was the "ordinary natural thing which must sometimes happen in such "circumstances."

Nor do I think that the position is altered by reason of the fact that the cattle had been on the plaintiff's ground for a short time before she was hurt. She and her man had gone out to prevent damage so far as possible. It was natural that they should do so; it is what one would expect. Neither of them did anything unusual or anything to excite the animals. The cattle (or some of them) may have got excited, but I prefer the view of their owner: "I would say it was clumsiness, not panic." That, again, is something which one might well expect, and the accident which followed was the sort of thing "which must "sometimes happen in such circumstances."

At one time I felt that if we allowed the appeal we should be extending the law, but on full examination of the authorities I have reached the conclusion that the plaintiff is entitled to succeed on the principle stated by Atkin L.J. in *Buckle* v. *Holmes*,[51] which summarizes the position. I would allow the appeal. It may seem strange to some that the plaintiff is entitled to recover, whereas if her man had been injured he would, in the absence of negligence, have had no cause of action. The right of action arises, as I have said, from the occupation of land.

I agree that the amount provisionally assessed as general damages is much too low, having regard to the injuries, and I would increase it from £500 to £1,500, so that the judgment in favour of the plaintiff should be for the sum of £2,200.

HODSON L.J. The plaintiff, a woman now 83 years of age, lived in a cottage at Hardingham, Norfolk. In a neighbouring field the defendant kept some heifers and bullocks. At 7.30 in the evening of October 8, 1951, some of these animals trespassed on the plaintiff's land, having entered through a shed by raising the topmost of two rails fixed in iron staples and stepping over the lower rail. In the course of the trespass the plaintiff suffered severe personal injuries, inflicted by one or more of the beasts. The judge found that there was no evidence of negligence on the part of the defendant in allowing the cattle to escape, and I do not think that there is any ground for disturbing that finding of fact.

---

[51] [1926] 2 K.B. 125.

The question to be decided on this appeal is whether the plaintiff can succeed in trespass, the judge having decided that she could not do so, apparently on the ground that the animals were mansuetae naturae and not proved to have a fierce disposition.

The proposition for which the plaintiff contends is that the defendant's cattle having escaped on to her land, and while there having acted in accordance with their normal propensity, she is entitled to any damage so caused to her as occupier of the land. She conceded that if the injury had been caused by a savage attack she could not have succeeded in an action of trespass, because she would then have had to prove scienter. This she could not do as she maintained throughout that the beasts were of placid disposition. The actual damage was caused by one or more of the beasts knocking her down in the darkness and subsequently treading on her as she was trying to get them out of her drive.

The defendant's contention is that no damages for personal injuries can be recovered in an action of cattle trespass.

The historical origin of cattle trespass, which is one of the oldest grounds of civil liability known to English law, dates back to the 14th century. The essence of cattle trespass, it has been said, is a depasturing and trampling down. (Compare Doctor and Student, Dial. 1, Chapter IX, and Noy's Maxims, Chapter 44.) "Every man is bound to make recompense for such hurt as his "beasts shall doe in the corn and grasse of his neighbour, though "he know not they were there."

The law on this subject is quite separate from the law as to scienter, which may be said to be a branch of the law of negligence, but the two things have been dealt with together in some of the authorities (for example, *Cox* v. *Burbidge*[52]) under the heading of liability of owners of domestic animals for damage done by them, with the result that it seems sometimes to have been assumed that in no case could damage be recovered for personal injuries inflicted by an animal mansuetae naturae without proof of scienter.

Although there is no authority which decides that personal injuries cannot be recovered in cattle trespass, there are dicta to this effect, notably in the speech of Lord du Parcq in *Searle* v.

[52] 13 C.B.N.S. 430.

Wallbank.[53] The actual decision in that case was that the owner of land adjoining the highway is under no duty to a member of the public, as opposed to the owner of the soil of the highway, to prevent his domestic animals, not known to be dangerous, from straying on the highway.

Lord du Parcq's speech contains a close study of the topic, and there are passages adverse to the contentions of the plaintiff. In particular I have in mind the passage read by Singleton L.J. which is followed by a reference to the dicta of Holt C.J. and Turton J. in *Mason* v. *Keeling*.[54] Lord du Parcq continued [55]: "The present case is only distinguishable from that supposed by "Holt C.J. in that the horse in the illustration did a vicious "act, whereas the horse with which we are concerned may have "been only heedless or clumsy. But I take this to be an "immaterial distinction. As was said by Romer L.J. (as he then "was) in *Deen* v. *Davies*,[56] it would be strange if the owner of a "horse which strays on the highway were to be free of liability if "his horse kicked a passenger, but liable if the passenger were "injured 'merely by the horse trotting along the highway in the "'natural manner.' My Lords, no such paradoxical conclusion "is to be drawn from the authorities. The law was accurately "stated by Blackburn J. in *Smith* v. *Cook*,[57] when he said that "the owner of animals 'not of mischievous nature . . . is entitled "'to suppose that they will not injure anyone until he has had "'actual knowledge to bring him to a contrary opinion.' I would "add that if an animal's owner knows that it has shown a "tendency to run into cyclists or other passengers on the high-"way, it cannot avail him to say that it was not vice, but a "frolicsome disposition, or perhaps mere blundering, which "caused the harm."

The paradox referred to by Lord du Parcq is present here, for the plaintiff does not contend that she could recover if the behaviour of the animals had been vicious, and it is not wholly satisfactory to make the decision as to liability turn on the disposition of an animal. It may be, however, that the paradox can be resolved by eliminating the distinction between vicious and non-vicious acts in cases of cattle trespass provided the damage caused is direct.

There is good authority for the view that the measure of damage in cattle trespass may include wrongs other than those of depasturing. The earliest case is *Anderson* v. *Buckton.*[58] This was an action for cattle trespass in the usual form alleging as a matter of aggravation that the cattle which trespassed were diseased and infected the cattle of the plaintiff. The plaintiff recovered, it being held that an action on the case would have lain for the bare infecting of the plaintiff's cattle without any allegation of "clausum fregit."

---

[53] [1947] A.C. 341.

[54] 1 Ld.Raym. 606, 608.

[55] [1947] A.C. 358.

[56] [1935] 2 K.B. 282, 293; 51 T.L.R. 398.

[57] 1 Q.B.D. 79, 82.

The next case of importance is not a case of cattle trespass at all, but is important as being one in which the court laid down its view as to the nature and extent of the action of cattle trespass. I refer to *Cox* v. *Burbidge*,[59] a decision of the Court of Common Pleas consisting of Erle C.J., Williams, Willes and Keating JJ. Williams J. said[60]: "If I am the owner of an "animal in which by law the right of property can exist, I am "bound to take care that it does not stray into the land of my "neighbour; and I am liable for any trespass it may commit, and "for the ordinary consequences of that trespass. Whether or not "the escape of the animal is due to my negligence, is altogether "immaterial. I am clearly liable for the trespass, and for all "the ordinary consequences of the trespass, subject to a distinc-"tion which is taken very early in the books, that the animal is "such that the owner of it may have a property in it which is "recognizable by law. For instance, if a man's cattle, or sheep, "or poultry, stray into his neighbour's land or garden, and do such "damage as might ordinarily be expected to be done by things "of that sort, the owner is liable to his neighbour for the "consequences."

Before leaving this case I would draw attention to some of the words of Willes J. He said[61]: "As to animals which are "not naturally of a mischievous disposition, the owner is not "responsible for injuries of a personal nature done by them, "unless they are shown to have acquired some vicious or "mischievous habit or propensity, and the owner is shown to "have been aware of the fact." In using these words he was not dealing with cattle trespass at all but with the scienter rule. In other words, he was not contemplating a placid domestic animal which in the course of a trespass on the land of another had done damage to the person of that other.

---

[58] 1 Str. 192.
[59] 13 C.B.N.S. 430.
[60] Ibid. 438.
[61] Ibid. 439.

The next case of importance is *Lee* v. *Riley*,[62] much relied upon by the plaintiff. Here, again, the injury was not to growing crops but to the horse of the plaintiff inflicted by the defendant's mare which had trespassed on to the plaintiff's land. The court was not unanimous in treating the action as one of cattle trespass simpliciter, some members basing liability on negligence; but in *Ellis* v. *Loftus Iron Co.*,[63] where the trespassing animal was a stallion which kicked the plaintiff's mare, on his land, the liability was fairly and squarely put in cattle trespass. The question was there treated as being one of remoteness of damage, and the damage was held not to be too remote.

If that is the correct view, the action of the beasts in this case, in knocking down and treading on the plaintiff in the course of their moving about her property in the dark, caused damage which is no more remote than the damage inflicted on the plaintiffs in *Ellis* v. *Loftus Iron Co.*[63] and in *Lee* v. *Riley*.[62]

Since the decision in *Polemis and Furness, Withy & Co.*,[64] no question of foreseeability arises, although this might otherwise have caused difficulty in considering remoteness of damage.

The fact that the plaintiff did not leave the beasts to wander about her land without attempting to remove them does not seem to me to affect the question of remoteness so as to make the cause of the injury her own intervention rather than the trespass of the cattle. She did no more than take the natural and appropriate steps as best she could to deal with the trespassing cattle and was injured in the process.

There are dicta on which the plaintiff is entitled to rely in several recent cases. I have in mind as an example *Manton* v. *Brocklebank*,[65] in which the proposition sought to be advanced was that the owner of a tame animal is liable (apart from negligence or cattle trespass) for damages caused by the animal in following its natural propensities. The proposition was negatived by the court, but Lord Sterndale M.R., after discussing the cases of *Lee* v. *Riley* [66] and *Ellis* v. *Loftus Iron Co.*,[67] said [68]: "As I have before pointed out, when a cause of action, whether "in trespass or negligence, has once been established, the defen- "dant may well be liable for any damage produced by acts not "alien to the nature of the animal and cannot say such damage

---

[62] 18 C.B.N.S. 722.

[63] L.R. 10 C.P. 10.

[64] [1921] 3 K.B. 560; 37 T.L.R. 940.

[65] [1923] 2 K.B. 212.

[66] 18 C.B.N.S. 722.

[67] L.R. 10 C.P. 10.

[68] [1923] 2 K.B. 223.

"is too remote." I believe that to be a correct statement of the law as applicable to the facts of this case.

For these reasons I agree that the appeal be allowed.

On the question of damages I agree that the amount provisionally awarded as general damages by Croom-Johnson J. is so much too low that this court should interfere.

Although the plaintiff had reached an advanced age at the time of the injury and had been partly incapacitated in an earlier accident, she has suffered greatly and is now in a position where she has to have someone by way of a nurse-companion to look after her, whereas previously she was able to look after herself. This factor cannot, I think, have been taken into consideration at the trial. I would raise the figure of general damages to £1,500, which with the special damages will make a total of £2,200 damages.

Appeal allowed.
Judgment for plaintiff.

Solicitors: *Haslewood, Hare, Shirley Woolmer & Co. for Hood, Vores & Allwood, Dereham, Norfolk; Berrymans for Hill & Perks, Norwich.*

P. B. D.

END OF VOL. I.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1954, will be as follows:—

In the First Series,
[1954] Ch.

In the Second Series,
[1954] 1 Q.B.   [1954] 2 Q.B.   [1954] P.

In the Third Series,
[1954] A.C.

INDEX

ADMINISTRATOR—*Administration bond—Will—Cesser of liability—Estate wound up and residue in hands of administrator — Failure of administrator to pay residue to residuary legatee — Whether sureties liable under bond.*
Harvell *v.* Foster - **Lord Goddard C.J. 591**

AGRICULTURE—Game. See Landlord and Tenant.

ANIMALS. See Trespass.

ARBITRATION — *Jurisdiction — Arbitrator's inquiry into own jurisdiction — Effect on award.*
Christopher Brown Ld. *v.* Genossenschaft Oesterreichischer Waldbesitzer Holzwirtschaftsbetriebe Registrierte Genossenschaft mit Beschrankter Haftung **Devlin J. 8**

BUILDING LICENCE. See Landlord and Tenant.

CATTLE TRESPASS. See Trespass.

CHILDREN—Allurement. See Negligence.

COMPANY—In process of formation. See Contract.

CONTEMPT OF COURT—*Report of judicial proceedings—False report—Trial for murder—Honest mistake by reporter—Publication in good faith—Interference with course of justice—Liability of editor and proprietors—Vicarious liability.*
Regina *v.* Evening Standard Co. Ld. **Divl.Ct. 578**

CONTRACT — *Illegality — Damages—Sale of wheat seeds—Breach of condition regarding description—Same wheat sold by merchants to plaintiff on same description—Failure by merchants to deliver to plaintiff statement containing particulars prescribed by section 1 of the Seeds Act, 1920—Illegality in performance of contract—Plaintiff awarded damages and costs against seed merchants—Recovery of their loss by merchants from their vendor as third party.*
Seeds — Sale — Statement of particulars — Variety—Effect—Seeds Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 54), *ss.* 1, 2 (1), 6 (1).
Marles *v.* Philip Trant & Sons Ld. MacKinnon Third Party - - - **C.A. 29**

2. —— *Illegality — Road Traffic — Sale of motor-vehicle—Mechanical defects—"Not fit "for use on the road"—Whether sale unlawful—Defects in construction and equipment—Defects in use and maintenance—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 3 (1)—*Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 8 (1)—*Motor Vehicles (Construction and Use) Regulations,* 1951 (*S.I.* 1951, *No.* 2101).
Road Traffic—Sale of motor-vehicle—Construction and use.
Vinall *v.* Howard - - - **C.A. 375**

3. —— *Parties — Company — In process of formation—Not registered—Contract of sale purporting to be made by company—Signature of future director below name of company—Whether director could enforce contract.*
Newborne *v.* Sensolid (Great Britain) Ld. **C.A. 45**

4. ——. See Vendor and Purchaser.

COURT MARTIAL—*Jurisdiction—Murder—Alien killed abroad by British soldier—Power of court-martial to try for murder—Queen's peace—Offences against the Person Act,* 1861 (24 *&* 25 *Vict. c.* 100), *s.* 9—*Army Act,* 1881 (44 *&* 45 *Vict. c.* 58 (*as amended and re-enacted*)), *s.* 41.
Regina *v.* Page - - - **C.-M. A.C. 170**

CRIMINAL LAW—*Carrying offensive weapon—Lawful authority or reasonable excuse—Air rifle being used at shooting gallery fired at bystander—Prevention of Crime Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 14), *s.* 1 (1).
Regina *v.* Jura - - - **C.C.A. 503**

2. —— *Conspiracy — Public mischief — Whether particulars of offence supported*

CRIMINAL LAW—*continued.*

charge known to the law—Supply of pottery in United Kingdom—Fraudulent means—Purpose of statutory instrument defeated—Revenue—Tax avoidance scheme—Legality—Domestic Pottery (Manufacture and Supply) Order, 1947 *(S.R. & O.* 1947, *No.* 373)*—Domestic Pottery (Manufacture and Supply) (Amendment) Order,* 1948 *(S.I.* 1948, *No.* 1616).
Criminal Law — Practice — Trial — Several defendants—Separate summing-up and verdict against each—Jury allowed to disperse after each verdict—Propriety.
REGINA *v.* NEWLAND - - - **C.C.A. 158**

3. —— *Evidence—Witnesses—Competency — Husband and wife — Nullity — Voidable marriage — Criminal offences committed by husband during coverture—Nullity decree—Prosecution—Whether wife competent to give evidence against former husband.*
REGINA *v.* ALGAR - - - **C.C.A. 279**

4. —— *Larceny — Fixture — Army hut — Erected for temporary purpose — Bolted to concrete foundation—Whether "attached to or forming part" of the realty—Larceny Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 1 (3).
BILLING *v.* PILL - - - **Divl.Ct. 70**

5. —— Murder abroad. See COURT MARTIAL.

6. —— *Procedure—Indictment—Plea before arraignment — Allegation that evidence on deposition insufficient to support a conviction —Whether power to quash indictment—Quarter sessions—Mandamus—Certiorari.*
REGINA *v.* CHAIRMAN OF COUNTY OF LONDON QUARTER SESSIONS. *Ex parte* DOWNES
Divl.Ct. 1

7. —— *Vagrancy — Prostitution — Living on the earnings of prostitution—Money paid by men to hire-car driver for use of car as brothel — Money paid for use of house as brothel—No money paid by or to prostitutes —Vagrancy Act,* 1898 (61 *&* 62 *Vict. c.* 39), *s.* 1 (1) (3)*—Criminal Law Amendment Act,* 1912 (2 *&* 3 *Geo.* 5, *c.* 20), *s.* 7.
CALVERT *v.* MAYES - - **Divl.Ct. 342**

DAMAGES. See SALE OF GOODS; TRESPASS.

DANGEROUS PREMISES. See LICENSOR AND LICENSEE.

EDUCATION — *"Parent" — Meaning — Verminous child — Child's condition due to mother's neglect — Mother's liability as "Parent"—Education Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *ss.* 54 (6), 114 (1).
"Parent."
PLUNKETT *v.* ALKER - - - **Divl.Ct. 420**

2. —— *School attendance — Powers of head teacher—Discipline—Pupil's dress—Girl sent to school wearing slacks—Excuses for non-attendance—Whether statutory list exhaustive—Education Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 31), *s.* 39.
SPIERS *v.* WARRINGTON CORPORATION
Divl.Ct. 61

EMERGENCY LEGISLATION — Building Licence. See LANDLORD AND TENANT.

EQUITY—Clean Hands. See LANDLORD AND TENANT.

EVIDENCE — *Admissibility—Motor-car—Collision—Written statement signed by plaintiff shortly after the accident—Copy made by police sergeant—Original lost—Death of plaintiff before trial of his action for damages—Copy inadmissible in evidence—Evidence Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 28), *s.* 1 (1) (2) *and* (3).
BOWSKILL *v.* DAWSON. NATIONAL PROVINCIAL BANK LD. *v.* DAWSON - **Devlin J. 288**

2. —— Husband and Wife — Competence after Nullity Decree. See CRIMINAL LAW.

EXECUTION—*Sheriff—Summons for protection—Seizure of caravan—Plaintiff inside—Claim to caravan by third party — Claim admitted by judgment creditor—Notice of admission given by sheriff's officer—Withdrawal of sheriff—Action in trespass—R.S.C., Ord.* 57, *r.* 16A.
Sheriff—Execution—Summons for protection.
CAVE *v.* CAPEL - - - - **C.A. 367**

FACTORY—Electricity. See INVITOR AND INVITEE.

HIGHWAY—*Private street works—Objection to proposals—"Insufficient or unreasonable" —Proposed work premature—Jurisdiction of justices—Private Street Works Act,* 1892 (55 *&* 56 *Vict. c.* 57), *s.* 7 (*d*).
Local Authority — Private street works — "Unreasonable."
SOUTHGATE BOROUGH COUNCIL *v.* PARK ESTATES (SOUTHGATE) LD. - - **C.A. 359**

ILLEGALITY—Building Licence. See LANDLORD AND TENANT.

2. ——. See CONTRACT.

INSURANCE — *Marine — Freight—Restraint of princes — Civil war — Frustration clause—Time clause—Loading of cargo prevented by government forces during civil war—Abandonment of voyage — Justification — Charter in substitution for original charter—Quantum of loss.*
ATLANTIC MARITIME CO. INC. *v.* GIBBON
C.A. 38

2. —— *Motor-car — Exclusion clause — Insurers not liable if car "conveying any load "in excess of that for which it was con- "structed"—Number of passengers in excess*

INSURANCE—*continued.*
of seating accommodation—Whether clause applicable—Contract—Construction—Contra proferentem rule.
Houghton *v.* Trafalgar Insurance Co. Ld. **C.A. 247**

INVITOR AND INVITEE—*Factory—Fire—Dangerous premises—Causation—Injury caused by concurrent causes—Failure to turn off main switch—Other switch turned off—Wires transposed unknown to occupier—Fireman electrocuted—Whether occupier liable—Relevance of statutory duty regarding switches.*
Factory—Persons benefited by regulations—"Person employed"—Fireman electrocuted in factory premises while fighting fire—Mains switch not conforming to regulations—Firemen not "persons employed"—No right of action—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12)—*Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts,* 1901 *and* 1907 (*S.R. & O.* 1908, *No.* 1312).
Factory—Electricity—Switch. Factory—Common law duty—Relevance of regulations. Fire Brigade. Causation. Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 *and* 1907 (*S.R. & O.* 1908, *No.* 1312).
Hartley *v.* Mayoh & Co. - - **C.A. 383**

JUDGMENT—Extempore followed by written. See Landlord and Tenant.

JURY. See Practice and Procedure.

LANDLORD AND TENANT—*Act of* 1927—*Goodwill—Compensation—New five year lease granted to tenant in lieu of compensation—Landlord given power to determine new lease and tenant leave to apply to court in future for compensation for unexpired residue of term—Jurisdiction of county court judge to order compensation in terms borrowed from subsection of Act not directly applicable to present facts—Landlord and Tenant Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 36), *ss.* 4, 5 (1), (2) *and* (5).
Lambert *v.* Ve-Ri-Best Manufacturing Co. Ld. - - - - - - - - **C.A. 524**

2. —— *Leasehold property—New tenancy—"Shop"—Dairy—Retail milk round—Whether dairy a "shop"—Statute—Interpretation clause—Relevance of ordinary meaning of word—Shops Act,* 1950 (14 *Geo.* 6, *c.* 28), *s.* 74—*Leasehold Property (Temporary Provisions) Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *ss.* 10 (1) (2) (4), 20.
Deeble *v.* Robinson - - - **C.A. 77**

3. —— *Profit à prendre—Game—"Reservation" of game, rabbits, etc.—"Re-grant" by tenant—Extermination of rabbits by gas—Reasonable operation in interests of farming—Snares set by grantee—Unreasonable—Oral letting of rabbiting rights—Tainted with illegality—No equitable right to profit à prendre—Ground Game Act,* 1880 (43 *&* 44 *Vict. c.* 47), *s.* 1 (1) (*b*)—*Agriculture Act* 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *s.* 98—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *s.* 65 (1).
Agriculture. Equity—Clean hands—Equitable right—Evidenced by false receipt—Dishonest motive—Unenforceability. Specific Performance.
Mason *v.* Clarke - - - **C.A. 460**

4. —— *Rent restriction—Claim for possession—Lease—Covenant not to assign without consent—Sublease with consent of landlord—Assignment of sublease with consent of superior landlord to a company for the use and occupation of a named person—Assignment to that person with consent only of sublessor—Whether assignee a lawful subtenant entitled to protection of Rent Acts—Restrictive covenant—Contract—Benefit to third party—Third party's right to sue—Covenant respecting property—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 12 (1) (*f*) (*g*), 15 (3)—*Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3 (1) *and Sch. I, paras.* (*a*) *and* (*d*).
Drive Yourself Hire Co. (London) Ld. *v.* Strutt - - **Lynskey J. and C.A. 250**

5. —— *Rent restriction—Premium—Price of furniture—Grant of tenancy—Furniture to be purchased by tenant—Whether price in excess of "the reasonable price"—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *ss.* 2 and 3.
Eales *v.* Dale - - - - **C.A. 539**

6. —— *Rent Restriction—Premium paid by third person—Recovery by tenant—Set-off against arrears of rent—Limitation—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *ss.* 8, 14 (1)—*Rent and Mortgage Interest Restrictions Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 32), *s.* 8 (2)—*Increase of Rent and Mortgage Interest (Restrictions) Act,* 1938 (1 *&* 2 *Geo.* 6, *c.* 26), *s.* 7 (6)—*Landlord and Tenant (Rent Control) Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 40), *s.* 2 (5).
Temple *v.* Lewis - - - - **C.A. 22**

7. —— *Rent restriction—Statutory tenant—Contract to purchase dwelling-house by statutory tenant—Status of purchaser pending completion—Whether statutory tenancy surrendered—Express preservation of existing tenancy—Intention of parties.*
Vendor and Purchaser. Landlord and Tenant—Contract by tenant to purchase reversion.
Nightingale *v.* Courtney - - **C.A. 399**

LANDLORD AND TENANT—*continued.*

8. —— *Rent restriction—Sublease—Sublease by tenant of paddock together with rooms in farm-house belonging to him—Rooms and paddock a "dwelling-house" within Rent Acts — Purchase of paddock by plaintiffs — Claim by plaintiffs for possession of paddock from tenant and subtenant—Termination of interest of tenant—Subtenant not protected under Acts against plaintiffs as landlords—Increase of Rent and Mortgage Interest (Restrictions) Act,* 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15 (3)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3).
Judgment — Extempore judgment — Followed by written judgment—County court.
Knight *v.* Olive - - - - **C.A. 514**

9. —— *Rent tribunal—Furnished premises —Business premises — Boarding house — Tenant residing in basement—Jurisdiction of rent tribunal to fix rent—Application of Rent Restriction Acts definition of "dwelling-house" — Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 2 (1).
Regina *v.* York, Harrogate, Ripon and Northallerton Areas Rent Tribunal. *Ex parte* Ingle - - - - **Divl.Ct. 456**

10. —— *Rent tribunal—Furnished premises —Rent fixed by tribunal and registered—Excess rent received for part of premises — Whether offence committed — "Those "premises"—Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 4 (1) (*a*).
Statute—Construction—Penal Act—Act to be strictly construed.
Gluchowska *v.* Tottenham Borough Council - - - - - **Divl.Ct. 439**

11. —— *Rent tribunal—Furnished premises —Rent registered—Payment of excess rent —Amount recoverable — Furnished Houses (Rent Control) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 4.
Henry *v.* Taylor - - - - **C.A. 506**

12. —— *Rent tribunal—Standard rent—Business premises with living accommodation above — Covenant against use of premises otherwise than as shop — Tenant carrying on business and living on premises—Jurisdiction of tribunal to fix rent—Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (3)—*Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 1.
Landlord and Tenant—Restrictive covenant—Long contrary user.
Regina *v.* Brighton and Area Rent Tribunal. *Ex parte* Slaughter - **Divl.Ct. 446**

13. —— *Repairs—Weekly tenancy—Duty of tenant—Keeping premises "wind and water "tight" — Duty "to use premises in a "tenantlike manner"—Permissive waste—Tenant from year to year.*
Warren *v.* Keen - - - - **C.A. 15**

14. —— *Vendor and purchaser—Negotiations subject to contract—Agreement to alter premises—Negotiations abortive—Claim for cost of alterations—Claim implied in law—Restitution.*
Building — Licence — Extras — Separately ordered—Presumed within free allowance.
Brewer Street Investments Ld. *v.* Barclays Woollen Co. Ld. - - **C.A. 428**

LICENSOR AND LICENSEE—*Dangerous premises—Hidden trap known to licensor—Danger not appreciated by licensor—Liability —Test whether reasonable man, with licensor's knowledge, would have appreciated the danger —Acts of commission and omission—Darkness —Effect—Fall on steps in dark—Step defective —Requisitioned premises—Liability of council.*
Hawkins *v.* Coulsdon and Purley Urban District Council - - - - **C.A. 319**

LIMITATION OF ACTION — *Contract — Underpayments of salary received by mistake —Action for account and for recovery of money due under contract—Claim barred after six years—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 26 (*a*), (*b*) *and* (*c*).
Phillips Higgins *v.* Harper
Pearson J. 411

2. —— *Rating — Recovery of general rate — Issue of distress warrant more than six years after accrual of general rate—"Action "to recover any sum recoverable by virtue of "any enactment"—"Action"—"Proceeding "in a court of law"—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2 (1), 31.
China *v.* Harrow Urban District Council
Divl.Ct. 178

LOCAL AUTHORITY—Private Street Works. See Highway.

METROPOLIS—*Fire—Precautions—Means of escape in case of fire—Failure to maintain means of escape in efficient working order—Employee of tenant injured in escaping from fire—Breach of statutory duty under London Building Acts (Amendment) Act,* 1939 —*Whether owners and receiver liable—Whether receiver "owner" — Fire caused by short circuit—Defence of accident—Statutory duty—Statute imposing penalty for breach—Statute for benefit of particular class of persons—Whether person injured by breach has right of action—Fires Prevention (Metropolis) Act,* 1774 (14 *Geo.* 3, *c.* 78), *s.* 86 — *London Building Acts (Amendment) Act,* 1905 (5 *Edw.* 7, *c. ccix*), *s.* 12—*London Building Acts (Amendment) Act,* 1939 (2 *&* 3 *Geo.* 6, *c. xcvii*), *ss.* 33, 35, 133, 148.

METROPOLIS—*continued.*

Statutory Duty—Whether civil right created—Penalty. "Owner."
Solomons *v.* R. Gertzenstein Ld. **Lord Goddard C.J. 565**

NEGLIGENCE — *Children — Licence to go over land—Unguarded tramway—Child injured while stealing ride on colliery tram—Child's knowledge of wrongdoing—No necessary implication of knowledge of danger—Tramway a dangerous allurement—Liability.*
Gough *v.* National Coal Board - **C.A. 191**

PARENT. See Education.

PENALTY—Forfeiture. See Vendor and Purchaser.

PRACTICE AND PROCEDURE — *Jury — Civil action—Verdict taken by associate in judge's absence—Validity of verdict—Undesirability of practice—"Open court"—"Privy "verdict."*
Hawksley *v.* Fewtrell - - **C.A. 228**

2. —— *Parties — Representative action — Action on behalf of all tenants of local authority—Conflicting interests of different classes of tenant—Whether action properly constituted —R.S.C., Ord.* 16, *r.* 9.
Smith *v.* Cardiff Corporation - **C.A. 210**

PROFIT À PRENDRE. See Landlord and Tenant.

PROSTITUTION. See Criminal Law.

RATES AND RATING—*Assessment—Rateable value — Valuation list — Alteration — Proposals for alteration of valuation list made by rating authority—Employment of surveyor by authority to review the assessment of properties—Surveyor's fees paid out of general rating fund—Power of authority to employ surveyor—Duty of local authority to make proposals for amendment of valuation list—Local Government Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 187—*Local Government Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 26), *ss.* 33, 40.
Grainger *v.* Liverpool Corporation **Divl.Ct. 351**

2. ——. See Limitation.

REPRESENTATIVE ACTION. See Practice and Procedure—Parties.

ROAD TRAFFIC — Construction of motor-vehicle. See Contract—Illegality.

2. —— *Public service vehicle — Stage or express carriage—Exception of vehicle used on "special occasion"—Fishing trip—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 61 (1) (2), 72—*Road Traffic Act,* 1934 (24 *&* 25 *Geo.* 5, *c.* 50), *s.* 25.
Wurzal *v.* Dowker - - - **Divl.Ct. 52**

SALE OF GOODS—*Breach of condition—Merchantable quality — Goods bought under trade name—"Goods supplied under a contract of sale" — Purchase of one ton of Coalite — Damage to purchaser by explosive mixed with Coalite — Consignment not of "merchantable quality"—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 14 (1) (2).
Wilson *v.* Rickett Cockerell & Co. Ld. **C.A. 598**

2. —— *Warranty as to performance of plant sold — Breach — Capital loss — Loss of profit — Measure of damages — Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 53.
Cullinane *v.* British "Rema" Manufacturing Co. Ld. - - - - **C.A. 292**

SEEDS. See Contract.

SHERIFF. See Execution.

SHOP. See Landlord and Tenant—Leasehold Property.

SOLICITOR — *Signature — Bill of costs — Facsimile rubber stamp signature—Business name of solicitor affixed to bill by a rubber stamp—Solicitor practising alone—Whether bill duly "signed"—Soicitors Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 37), *s.* 65.
Signature. Business Name—Signature—Sole proprietor.
Goodman *v.* J. Eban Ld. - - **C.A. 550**

SPECIFIC PERFORMANCE. See Landlord and Tenant.

STATUTE—Construction. See Landlord and Tenant—Rent Tribunal.

2. —— Interpretation. See Landlord and Tenant—Leasehold Property.

STATUTORY DUTY—Breach. See Metropolis.

STATUTORY INSTRUMENT — *Notice to public—Certificate—Sale of goods in excess of Schedule — Absence of certificate exempting from printing — Validity — Statutory Instruments Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 36), *ss.* 2, 3—*Statutory Instruments Regulations,* 1947 (*S.I.* 1948, *No.* 1), *reg.* 7.
Regina *v.* Sheer Metalcraft Ld. **Streatfeild J. 586**

TOWN AND COUNTRY PLANNING—*Purchase notice by owner—Refusal of permission to develop—Land let at less than rack-rent—"Owner" of land—Whether freeholder owner—Rack-rent—Derelict and sterilized site —Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *ss.* 19 (1), 119 (1).
Regina *v.* Minister of Housing and Local Government. *Ex parte* Corporation of London - - - - - - **C.A. 140**

TRESPASS — *Cattle — Personal injury to occupier of land—Injury not due to vicious action by cattle—Damage to occupier not too remote—General damages increased.*
Damages—Remoteness of damage—Trespass.
WORMALD *v.* COLE - - - **C.A. 614**

VAGRANCY. See CRIMINAL LAW.

VENDOR AND PURCHASER — *Forfeiture clause—Equitable relief—Sale of plant and machinery—Payment by instalments—Failure to complete payments—Time essence of the contract — Rescission clause — Forfeiture of instalments paid—Purchaser not ready and willing to complete—Whether forfeiture exaction of a penalty—Claim by purchaser to relief.*
Contract—Penalty—Forfeiture clause—Penalty or in the nature of penalty—Principle of equity—Whether applicable. Sale of goods. Restitution.
STOCKLOSER *v.* JOHNSON - - - **477**

2. ——. See LANDLORD AND TENANT.

BIBL. LONDIN UNIV.